Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp., British Telecommunications, plc,	)	
VLT Co. L.L.C., Violet License Co. LLC, and	)	
TNV [Bahamas] Limited Applications	)	IB Docket No. 98-212
For Grant of Section 214 Authority, Modification	)	SES-ASG-19981110-01654 (30)
of Authorizations and Assignment of Licenses in	)	SES-ASG-19981110-01655 (2)
Connection With the Proposed Joint Venture Between	)	
AT&T Corp.and British Telecommunications, plc	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1999 Released: October 29, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

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I. INTRODUCTION

1. AT&T Corp. (AT&T), British Telecommunications (BT), VLT Co. L.L.C. (VLT), TNV [Bahamas] Limited (TLTD), and Violet License Co. LLC (License Co.), collectively "AT&T/BT," have applied for the Commission's consent, under Sections 214 and 310(d) of the Communications Act of 1934, as amended,[1] and the Submarine Cable Landing Act,[2] to obtain or transfer certain licenses and authorizations in connection with the proposed joint venture (JV) between AT&T and BT to provide international telecommunications services.

2. Because we find that AT&T/BT have demonstrated that the joint venture is in the public interest, we approve, subject to certain conditions: (a) the grant of Section 214 authority

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[1] Communications Act of 1934, 47 U.S.C. §§ 214 (1991 and Supp. 1998) and 310(d) (1991).

[2] Submarine Cable Landing Act, 47 U.S.C. §§ 34-39 (1991).

to VLT and TLTD to provide facilities-based and resold international common carrier services; (b) the assignment to VLT of submarine cable licenses held by AT&T or its subsidiaries; (c) the assignment to License Co. of certain earth station licenses held by AT&T or its subsidiaries, and (d) the modification of certain Section 214 authorizations held by AT&T or its subsidiaries.[3]

II. BACKGROUND

A. The Applicants

[3] AT&T seeks to modify its Section 214 authorization only to the extent necessary to assign to VLT the ownership interests held by AT&T in international cable facilities within United States territorial limits and to assign to TLTD the ownership interests held by AT&T in international cable facilities outside of the U.S. territorial limit. AT&T does not seek any other changes in its current Section 214 authorization to provide facilities-based and resold international common carrier services.

3. AT&T, a corporation organized under the laws of Delaware, is the largest long-distance and international telecommunications services carrier in the United States.[4] It provides voice and data communications services to residential, business, and government customers, and provides service to over 200 countries and territories around the world. AT&T holds Section 214 authorizations and certificates to provide international services and maintain ownership interests in international cable facilities. AT&T also holds radio licenses for earth stations used to provide international services.

4. BT, a company organized under the laws of England and Wales, is the largest telecommunications operator in the United Kingdom, providing local, long-distance, and international telecommunications services and telecommunications equipment to customers' premises. BT also offers a range of other telecommunications services, including private line circuits, mobile telecommunications services, and paging services. BT provides service to over 200 countries around the world. BT's wholly-owned affiliate, BT North America, Inc. (BTNA), is authorized pursuant to Section 214 to provide certain U.S. international telecommunications services.

5. VLT, a Delaware limited liability corporation, is a subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. AT&T proposes to assign to VLT its ownership interests in cable landing stations in the United States and international submarine cable facilities within the U.S. territorial limits. VLT seeks new Section 214 authorization to provide facilities-based and resold international basic switched, private line, data, television, and business services.

6. TLTD, a Bahamas-based corporation, is also a subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. AT&T proposes to assign to TLTD its ownership interests in international submarine cable facilities outside the U.S. territorial limits. TLTD's assets will also include BT's ownership interests in international submarine cable facilities outside the U.K. territorial limits and AT&T's and BT's operating agreements to provide international telecommunications services to various countries. TLTD seeks new Section 214 authorization to provide facilities-based and resold international basic switched, private line, data, television, and business services.

7. License Co., a Delaware limited liability corporation, will be a wholly-owned subsidiary of VLT. AT&T proposes to assign to License Co. its earth station licenses.[5]

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[4] Federal Communications Commission, *Trends in Telephone Service* at 24, 53-54 (Common Carrier Bur., Industry Analysis Div., Feb. 1998).

[5] Applications and Public Interest Statement in Support of the Global Venture of AT&T Corp. and British Telecommunications, plc (AT&T/BT application) at 5-6, (Nov. 10, 1998). In addition, BT will transfer its international cable facilities and cable landing stations to Concert Communications Co. (Concert), which is a U.K.-licensed

B. The Application

8. *The proposed joint venture.* On November 10, 1998, AT&T/BT filed an application seeking the Commission's consent for the grant, transfer, and modification of certain licenses and authorizations in connection with the proposed joint venture between AT&T and BT to provide international telecommunications services.[6] Under the proposed joint venture, AT&T will continue to offer international services to its customers on a common carrier basis pursuant to its Section 214 authorization. However, AT&T will no longer own any international facilities. Rather, the JV will provision to AT&T the underlying international services components, except for backhaul facilities and domestic switching services.[7] The JV will also provide wholesale, or carriers' carrier, services to international service providers on a common carrier basis. In addition, the JV will develop and offer new services to meet the telecommunications needs of multinational corporations (MNCs). AT&T and BT also propose to make substantial capital investments to enable the JV to replace AT&T's and BT's existing circuit-switched international facilities with a state-of-the-art Internet Protocol-based (IP) global network. AT&T and BT state that the proposed IP network will have a global architecture, based on open standards, to ensure that it is fully compatible with the networks of AT&T, BT, and foreign carriers that will operate in conjunction with the JV outside the United States and United Kingdom.

9. AT&T/BT assert that the JV will promote the public interest by: (a) promoting competition in the market for the provision of "global seamless services" to MNCs; (b) promoting competition in the provision of packet-switched international services by enabling AT&T and BT to accelerate the design, construction, and deployment of an advanced IP network; and (c) reducing settlement rates and hastening the demise of the traditional correspondent system through effective exploitation of efficient arrangements for the routing of traffic, such as hubbing and reorigination.

10. *Regulatory action.* In addition to the Commission, the Department of Justice (DOJ), Oftel (the U.K. telecommunications regulator), and the European Commission (EC) also

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subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. *See ex parte* letter from James E. Graf, II, BTNA, to Magalie Roman Salas, Secretary, FCC at 2 (June 28, 1999) (AT&T/BT June 28, 1999 *ex parte* letter). AT&T/BT do not seek Commission authorization for the Concert JV entity.

[6] AT&T/BT application. In addition, on November 16, 1998, AT&T/BT filed the "Framework Agreement" describing the joint venture (*Framework Agreement*), and, on November 23, 1998, they filed additional Exhibits to the Framework Agreement.

[7] AT&T will continue to own backhaul facilities, switches, and other facilities that it uses to provide telecommunications services in the United States.

reviewed this proposed joint venture. On March 30, 1999, the EC cleared the joint venture subject to the condition that AT&T sell off certain cable assets, and adopt structural separation safeguards between AT&T and other cable assets, in the United Kingdom. The EC found that AT&T/BT would have a combined market share of 30-50 percent of the global telecommunications services market, 18 percent of international bilateral carrier services traffic, and 50 percent of the traffic and 20 percent of the capacity on the U.S.-U.K. route. The EC concluded that there were several actual and potential competitors in all the markets and "plentiful additional capacity" at declining prices. Thus, the EC determined that the proposed joint venture would not have an anticompetitive effect. The EC authorized the JV to self-correspond on the U.S.-U.K. route.[8]

11. Oftel states that it has considered the effect of the joint venture on the current regulatory regime for international services. On June 1, 1999, Oftel issued a proposed license for the joint venture in which Oftel proposes to transpose a number of special conditions currently applied to BT to the joint venture. The specific conditions relate to BT's obligations to provide universal service, interconnection, non-discriminatory treatment, and to maintain accounting separations.[9]

12. On June 28, 1999, after conducting a review pursuant to the Hart-Scott-Rodino amendment to the Clayton Act,[10] DOJ concluded that the proposed joint venture may proceed.[11] In this Order, we independently review the proposed joint venture based on our statutory public interest standard, as described below.

III. PUBLIC INTEREST FRAMEWORK

A. Legal Standards

13. Pursuant to Sections 214(a) and 310(d) of the Communications Act (the Act), the Commission must determine whether AT&T/BT has demonstrated that granting, amending, or

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[8] *See* European Commission press release, *Commission clears BT/AT&T joint venture with conditions in the U.K. market,* Mar. 30, 1999, attached to *ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC, (Apr. 13, 1999) (AT&T/BT April 13, 1999 *ex parte* letter). "Self-correspondence" means that a carrier can use its own facilities, rather than the facilities of a correspondent foreign carrier, to terminate traffic at the foreign end of a call.

[9] Oftel, *BT/AT&T proposed joint venture: A consultative document on the Concert license issued by the Director General of Telecommunications,* June 1999 < http://www.oftel.gov.uk/licensing/conc0699htm >.

[10] Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18 (1997).

[11] Communications Daily, Vol 19, No. 124 (June 29, 1999).

transferring control of the requested licenses and authorizations in connection with the proposed joint venture between AT&T and BT would serve the "public interest."[12] More specifically, under Section 214(a) of the Act, the Commission must find that the "present or future public convenience and necessity require or will require" approving AT&T/BTs' applications to modify AT&T's Section 214 authorization to allow it to transfer ownership of certain facilities to VLT and TLTD and to authorize VLT and TLTD to operate the acquired telecommunications lines.[13] Under Section 310(d) of the Act, the Commission must determine that the proposed transfer of earth station licenses "serves the public interest, convenience, and necessity" before it can approve the transaction.[14]

14. The public interest standard of Sections 214(a) and 310(d) of the Act is a flexible one that encompasses the "broad aims of the Communications Act."[15] These broad aims include, among other things, implementing Congress's "pro-competitive, de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition"[16] and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services."[17] The public interest analysis may also consider whether the proposed transaction will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.[18] In

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[12] 47 U.S.C. §§ 34-39, 214(a), 303(r), 310(d) (1994). *See Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee,* 13 FCC Rcd 15,236 (1998) (*AT&T/TCG Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI to WorldCom*, 13 FCC Rcd 18,025, 18,030, at ¶ 8 (1998) (*MCI WorldCom Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 19,987 at ¶¶ 29-36 (1997) (*Bell Atlantic/NYNEX Order*). The Commission also shares jurisdiction with the Department of Justice under sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *See* 15 U.S.C. §§ 18, 21(a) (recognizing the Commission's role as an antitrust agency with respect to acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy").

[13] 47 U.S.C. § 214(a).

[14] 47 U.S.C. § 310(d).

[15] *MCI WorldCom Order*, 13 FCC Rcd at 18,030, ¶ 9; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19,987, ¶ 2; *In the Matter of the Merger of MCI Communications Corp. and British Telecommunications PLC,* 12 FCC Rcd 15,351 (1997) (*BT/MCI Order*), at 15,353, ¶ 3.

[16] H.R. Rep. No. 104-458 at 1 (1996); Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

See H.R. Rep. No. 104-458 at 1. *See also*, *e.g.*, 47 U.S.C. §§ 259, 332(c)(7), 706.

[18] *See, e.g., MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 9; *AT&T/TCG Order*, 13 FCC Rcd at 1523, ¶ 11;

evaluating whether the proposed transaction furthers the aims of the Act, the Commission may consider the trends within, and needs of, the telecommunications industry, the factors that influenced Congress to enact specific provisions of the Act, and the nature, complexity, and rapidity of change in the telecommunications industry.[19]

15. The statutory standard that the Commission must apply in this case requires a balancing of the potential public interest harms against the potential public interest benefits,[20] and AT&T/BT bear the burden of proof of showing that the benefits outweigh the harms.[21] Our public interest analysis is not limited by traditional antitrust principles.[22] In the telecommunications industry for which we have statutory responsibility, as in most others, competition is shaped not only by antitrust rules but by the regulatory policies that govern interaction of firms inside the industries. An antitrust analysis -- such as that undertaken by the Department of Justice in this case -- focusses solely on whether a proposed merger will harm competition. Our public interest analysis also encompasses the broad aims of the Communications Act.[23] To apply our public interest test, then, we must determine whether the proposed transaction violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes. Ultimately, we must determine whether AT&T/BT has demonstrated that the proposed transaction, on balance, serves the public interest, considering both its competitive effects and other public interest benefits and harms.[24] Where necessary, the Commission may attach conditions to the approval of a transfer of licenses in order to ensure that the public

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Bell Atlantic/NYNEX Order, 12 FCC Rcd at 20,063, ¶ 158; *BT/MCI Order,* 12 FCC Rcd at 15,430, ¶ 205 (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis).

[19] *MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 9; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,003, ¶ 32; *BT/MCI Order*, 12 FCC Rcd at 15,365, ¶ 29.

[20] *MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, ¶ 157.

[21] *See, e.g.*, *MCI WorldCom Order*, 13 FCC Rcd at 18,031-32, ¶ 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,000-01, ¶ 29.

[22] *See Satellite Business Systems,* 62 F.C.C. 2d 997, 1069, 1088 (1977) *aff'd. sub. nom. United States v. FCC,* 652 F. 2d 72 (D.C. Cir. 1980) (*en banc*).

[23] *MCI WorldCom Order*, 13 FCC Rcd at 18,030, ¶ 9, *citing Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19,987, ¶ 2.

[24] *See MCI WorldCom Order*, 13 FCC Rcd at 18,031-32, ¶ 10; *AT&T/TCG Order*, 13 FCC Rcd at 15,243-44, ¶ 12*; Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,001, 20007, ¶ 29, 36; *BT/MCI Order,* 12 FCC Rcd at 15,367, ¶ 33.

interest is served by the transaction. Section 214(c) of the Act also authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[25] Similarly, Section 303(r) of the Act authorizes the Commission to prescribe such restrictions or conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act.[26] In addition, the Submarine Cable Landing Act[27] and Executive Order No. 10530[28] authorize the Commission to grant, withhold, or condition cable landing licenses, *inter alia,* "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."[29] In assessing the potential public interest effects of this transaction between AT&T and BT, we limit our analysis to those issues that have been raised by the parties to the proceeding and those additional issues that may significantly affect the public interest.[30]

B. Analytical Framework for Assessing Competitive Effects

16. Although the proposed transaction before us is a joint venture and not a merger, we generally follow the analytical framework adopted by the Commission in the *Bell Atlantic/NYNEX Order* and the *BT/MCI Order* in conducting our public interest analysis of the competitive effects of the proposed joint venture.[31] As the Commission noted in the *BT/MCI*

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[25] 47 U.S.C. § 214(c). *See, e.g., MCI WorldCom Order*, 13 FCC Rcd at 18,032, ¶ 10; *MCI Communications Corp*, 9 FCC Rcd 3960, 3968, ¶ 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-1872, ¶ 100-33 (1996) (*Sprint Declaratory Ruling*); *GTE Corp.*, 72 FCC 2d 111, 135, ¶ 76 (1979).

[26] 47 U.S.C. § 303(r). *See, e.g., FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat'l Citizens)* (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r))*; U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers).

[27] 47 U.S.C. §§ 34–39.

[28] Exec. Ord. No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 *et seq*.

[29] 47 U.S.C. § 35. See *Rules and Policies on Foreign Participation in the U.S.Telecommunications Market,* 12 FCC Rcd 23891, 23,933–35 ¶¶ 93–96 (1997) *(Foreign Participation Order*) (discussing Commission's authority to impose conditions on submarine cable licenses).

[30] For this reason, we do not describe or analyze markets in which the merger is not likely to produce public interest harms or benefits.

[31] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,008, ¶ 37; *BT/MCI Order,* 12 FCC Rcd at 15,367, ¶ 33. *See also MCI WorldCom Order*, 13 FCC Rcd at 18,035, ¶ 15. In both instances our focus is on whether the proposed transaction harms or benefits consumers. None of the parties argued that we should apply a different legal standard in reviewing a joint venture. Thus, we conclude that we should apply the same public interest analysis in reviewing a joint venture that we apply in reviewing a merger.

Order, this analytical framework is based not only on prior Commission analyses of market power,[32] but is also embodied in the antitrust laws, including the DOJ and Federal Trade Commission *1992 Horizontal Merger Guidelines* and the April 8, 1997 revisions of those guidelines.[33]

17. Consistent with the *1992 Horizontal Merger Guidelines*, the Commission, as part of its competitive effects analysis, seeks to define the relevant markets and those firms participating in those markets.[34] The Commission then analyzes whether the proposed merger will increase the likelihood that firms participating in those markets could exercise market power through either unilateral or coordinated anticompetitive behavior.[35] Finally, if the Commission concludes that the merger will increase the potential for the exercise of market power (through either unilateral or coordinated activity), the Commission attempts to determine if entry of new firms or construction of new capacity by existing firms in response to price increases will constrain any attempted exercise of market power.[36]

18. The *1992 Horizontal Merger Guidelines* suggest that, in assessing whether a merger involving firms currently competing in a market will result in anticompetitive effects, market shares should be assigned to each firm currently participating in the market. Then the pre-merger and post-merger levels of concentration should be calculated, using the Herfindahl-Hirschman Index (HHI). The merger guidelines also explicitly recognize, however, that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."[37]

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[32] *See, e.g.*, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15,756 (1997) (*LEC Regulatory Treatment Order*); *Pacific Telesis Group*, *Transferor, and SBC Communications, Inc., Transferee,* Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17,963 (1996) (*AT&T International Non-Dominance Order*) *recon. denied* 12 FCC Rcd 21,501 (1998); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Non-Dominance Order*).

[33] *BT/MCI Order*, 12 FCC Rcd at 15,368, ¶ 34, *citing* United States Dept. of Justice Antitrust Div., and Federal Trade Comm'n, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41,552 (1992) (*1992 Horizontal Merger Guidelines*); United States Dept. of Justice and the Federal Trade Comm'n, *Revision to Horizontal Merger Guidelines* (Apr. 8, 1997) (1997*Revision to Horizontal Merger Guidelines*).

[34] *MCI WorldCom Order*, 13 FCC Rcd at 18,036, ¶ 16; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,008-09, ¶ 37.

[35] *MCI WorldCom Order*, 13 FCC Rcd at 18,036, ¶ 16.

[36] *Id*.

[37] *1992 Horizontal Merger Guideline*s, 57 Fed. Reg. at 41,558, § 1.521.

19. The Commission also seeks to determine if market entry is unconstrained so that an attempted exercise of market power can be prevented, *i.e.,* if rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices by the merging entities.[38]

20. Finally, we must balance against the potential public interest harms the extent to which the joint venture may enhance efficiency.[39] As we noted in the *MCI WorldCom Order*, the Commission defined these efficiency benefits as "the pro-competitive benefits of a merger that improve market performance," thereby benefiting consumers through, for example, "lower prices, improved quality, enhanced service or new products."[40] In addition, we explained that only merger-specific efficiencies, *i.e.,* those that would not occur but for the merger or are unlikely to be achieved through less competitively-harmful means than the merger, are relevant to the public interest analysis.[41]

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

21. We consider in this section the competitive effects of the proposed joint venture in the global seamless services market, the U.S.-U.K route, third country routes, and in the transit market. We also analyze the possible public interest benefits, including potential efficiencies, and national security concerns.

A. Global Seamless Services

22. Based on our review of the evidence, we find it is unlikely that the proposed joint venture will have an anticompetitive effect in the market for global seamless services. We find that the global seamless services market has several significant participants, including large global alliances and numerous smaller carriers with a global or regional presence that have emerged as potentially significant rivals. We find that, given the changing alliances among carriers, the proposed joint venture will not eliminate a significant competitor. We also find that, although the proposed joint venture may increase concentration in the global seamless services

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[38] *MCI WorldCom Order*, 13 FCC Rcd at 18,099, at ¶¶ 131-132; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,049, ¶ 128, n. 244.

[39] *MCI WorldCom Order*, 13 FCC Rcd at 18,134, ¶ 194.

[40] *MCI WorldCom Order*, 13 FCC Rcd at 18,134, ¶ 194. *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,063, ¶¶ 157-158 (citing *1997 Horizontal Merger Guidelines Revisions*).

[41] *See generally 1997 Revision to Horizontal Merger Guidelines* (the revision updates "Efficiencies," Section 4 of the *1992 Horizontal Merger Guideline*s).

market, the JV will not be able to exercise market power because there are no barriers to entry in this market.

1. Definition of Global Seamless Services

23. In 1996, the Commission defined global seamless services as:

> a combination of voice, data, video, and other telecommunications services that are offered by a single source over an integrated international network of owned or leased facilities, and that have the same quality, characteristics, features and capabilities wherever they are provided.[42]

24. The Commission noted that end-to-end seamless service offers the advantage to customers of "one-stop shopping" and "single-source billing."[43] The Commission also noted that global seamless services include global virtual private networks, high-speed data offerings, packet-switched networks, bandwidth management products, store-and-forward fax, and e-mail. Depending on the needs of users, the services may employ advanced technologies such as frame relay, asynchronous transfer mode (ATM) and synchronous digital hierarchy technologies, and may be classified as telecommunications or information services.[44] Of course, today an IP network is a critical feature for many global seamless services customers.

25. We believe that this definition should be updated to reflect current market conditions. We conclude that three modifications are necessary. First, global MNCs often "multi-source" (i.e., seek multiple providers) rather than rely on a single source to provide global seamless services.[45] Global MNCs have in-house communications experts or hire consultants to advise them about their multi-million dollar telecommunications purchases, and are often willing to change their suppliers when they can obtain better terms or to ensure they get the services that best meet their needs.[46] Multi-sourcing is also attractive to these global MNCs because it offers them a benchmark against which to measure their suppliers' performance and enables them to switch their traffic to other suppliers if one supplier experiences technical problems on its network.[47] Thus, for example, as AT&T/BT note: (1) Boeing purchases some global network

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42 *Sprint Declaratory Ruling*, 11 FCC Rcd at 1864.

43 *Id.*

44 *Id.*

45 *See e.g.,* Affidavit of John Finnegan at 2-5 (Finnegan affidavit), attached to the AT&T/BT reply.

46 *Id.* at 2-3.

47 *Id.* at 2-3.

services from AT&T, but uses SITA (now Equant) and Sprint as its primary international services providers; (2) Compaq buys some global network services from AT&T and C&W, but uses MCI as its major supplier; and (3) Exxon purchases global network services from AT&T, but uses Global One as its primary international carrier.[48] Thus, we clarify that global seamless services can be offered by a single source or multiple sources.

26. Second, we clarify that an "integrated international network," as that phrase is used in the definition of global seamless services, includes a network with either global or regional coverage. We make this modification because global MNCs are increasingly using multiple vendors, with each providing service in a particular geographic region, when purchasing telecommunications services.[49] We reject C&W's argument that we should define global seamless services more narrowly. C&W argues that global MNCs have no financial incentive to purchase global seamless services from any carrier that does not have a global facilities-based network or offer "one stop shopping."[50] We find there is no evidence in the record to support this view. In fact, the record shows that, contrary to C&W's claim, several large global MNCs are purchasing global seamless services from carriers that do not own facilities-based global networks or offer "one stop shopping."[51] Thus, we conclude that a carrier may be a provider of global seamless services even if it does not own a facilities-based global network or offer "one stop shopping" on a global scale.

27. Third, because not every carrier that offers seamless service in fact has the capability to offer such services without network to network interfacing**,** we amend the definition of global seamless services to require that the international network have equivalent (though not necessarily identical) quality, characteristics, features, and capabilities.

28. In analyzing the global seamless services market, therefore, we define global seamless services as:

> a combination of voice, data, video, and other telecommunications services that are offered by a single source or multiple sources over an integrated global or regional international network of owned or leased facilities, and that have equivalent (though not identical) quality, characteristics, features and capabilities wherever they are provided.

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48 *Id.* at 2-3.

49 *Id.* at 3.

50 C&W opposition at 10-13, C&W reply at 7 (global seamless services are only those services provided "on a facilities basis through a meshed network architecture, and [...] in a single bid.").

51 Finnegan affidavit at 3.

2. Significant Providers of Global Seamless Services

29. We find that the significant providers of global seamless services include the largest carriers with global networks and established customer bases, emerging providers who are building advanced IP-based networks and forming alliances with smaller carriers, regional providers who serve particular geographic regions, and the in-house self-provisioning operations of numerous global MNCs. We briefly describe each of these significant providers of global seamless services.

30. *Global alliances:* Several of the world's largest telecommunications carriers have formed global alliances to provide global seamless services.[52] We describe below the most significant global alliances, as they are constituted at present. We note, however, that there have been, and will continue to be, changes in the membership of these global alliances as they review their strategic options and as new investment opportunities arise. The major alliances are:

31. *AT&T and its global partners*: AT&T provides global seamless services through its AT&T-Unisource Communications Services (AUCS) joint venture with Unisource (which is owned by PTT Telecom Netherlands (KPN), Telia, and Swisscom) and WorldPartners (consisting of Unisource, KDD, Telstra, and Singapore Telecom). AT&T is the exclusive distributor of AUCS and Worldpartners services in the United States.[53] AT&T also acquired IBM's global data networks in December 1998. AT&T states that approximately two-thirds of the assets it acquired from IBM relate to switching and related facilities located in the United States. AT&T also states that, in contrast to the large global MNC accounts that it serves through Unisource and WorldPartners, IBM's customers are primarily small and mid-sized corporate customers that purchase on average only tens of thousands of dollars of service annually.[54]

32. *BT and its global partners:* BT is a significant provider of global seamless services in Europe and the rest of the world and, through its Concert alliance, in the United

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[52] *See, e.g.,* C&W reply at 12; Equant reply at 3; AT&T/BT reply at 12-13.

[53] AT&T and Unisource recently announced they had signed an agreement defining the terms under which AT&T will withdraw from AUCS. *Ex parte* letter from Betsy Brady, AT&T, to Magalie Roman Salas, Secretary, FCC (June 11, 1999) (AT&T/BT June 11, 1999 *ex parte* letter). Infonet Services Corporation of the USA (Infonet) recently announced it had signed a memorandum of understanding to buy AUCS. Infonet is owned by Computer Sciences Corporation, Telia, KPN, Swisscom and Telstra. Infonet will replace AUCS in the WorldPartners alliance. Vanessa Clark, *Infonet Buys AT&T-Unisource for a European Reach,* at 1 (Apr. 19, 1999) < http://www.totaltele.com >.

[54] *Ex parte* letter from Mark Schneider, counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, Jan. 19, 1999 at 1-2 (AT&T Jan. 19, 1999 *ex parte* letter).

States. From January 1995 to September 1998, MCI was BT's partner in Concert and the exclusive distributor of Concert services in the United States. Concert also developed global seamless services products which BT, MCI, and their global partners distributed throughout the world. After September 1998, when BT bought MCI's shares in Concert and WorldCom bought BT's shares in MCI, MCI continued to distribute Concert services as a non-exclusive distributor.

33. *MCI WorldCom:* The combined MCI WorldCom owns and operates a global platform that enables business customers to combine voice and data traffic from local and international locations onto one seamless end-to-end network that serves 81 major markets and over 50 countries. MCI WorldCom claims that it offers the first and only communications platform that eliminates boundaries between local and long-distance, voice and data, and Internet services. MCI WorldCom offers frame relay and ATM global services, and states that its seamless network eliminates the need for network to network interfaces that may create bottlenecks, traffic delays, and reduced efficiencies.[55]

34. *Global One:* This alliance among Sprint, Deutsche Telecom, and France Telecom has 1,400 points of presence in over 65 countries. Global One claims to have one of the world's largest and most advanced ATM-based networks, which delivers a high speed service -- 1.5 Mbps to 155 Mbps -- that simultaneously supports voice, data, Internet, and multimedia in a self-healing network.[56]

35. *Cable and Wireless*: C&W states that it operates in over 70 countries and is building an IP-based global network that includes an Internet backbone in Europe and the Asia-Pacific region.[57] With the purchase of MCI's Internet backbones, C&W states that it now offers integrated voice, data, and Internet services in the United States and throughout the world.[58]

36. *Equant:* Formerly known as SITA, the global data network for major airlines, Equant states that it operates an advanced IP-based network that offers global wide area network (WAN)-to-local area network (LAN)-to-Desktop connectivity over the world's largest

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[55] MCI WorldCom press release, *MCI WorldCom Unveils New 'On-Net' Communications Services for Businesses*, (Sept. 28, 1998) < http://www.mciworldcom.com >.

[56] Global One press release, *Global One Expands Global ATM Service to 40 countries*, (Apr. 29, 1999) < http://www.global-one.com >. A self-healing network is one that uses a ring configuration to permit instantaneous self-restoration. *See MCI WorldCom Order,* 13 FCC Rcd at 18076, ¶ 89.

[57] C&W press release, *Cable and Wireless USA to Build Next Generation, High Capacity Internet Network* (Apr. 13, 1999) < http://www.cwusa.com./press > (C&W press release).

[58] *See* id.

commercial data network, which extends to over 220 countries and territories. Equant claims that it offers commercial customers fully managed end-to-end services over an integrated global network.[59]

37. *Potential emerging providers*: We also find that several new carriers and alliances are emerging as potentially significant providers of global seamless services. Many of these carriers are fast-growing due to their ability to provide global services over "state-of-the-art" IP-based global networks.[60] For instance, Teleglobe, the largest Canadian international services carrier, announced plans to build an IP-protocol network that will reach 400,000 route miles on several continents.[61] Qwest and KPN, a Dutch carrier, recently completed the first of six fiber optic rings across Europe that will provide IP-based services to large corporate customers.[62] Global Crossing, which recently acquired Frontier, is building a global IP network that may be the first to be completed.[63] GTS, which merged with Esprit to provide service over its pan-European network in 12 countries and 20 cities, also is building a global IP-based network to carry traffic at speeds up to 1.28 terabits per second.[64] Level 3, which is building a global IP network with transatlantic and transpacific undersea cables joining the continental networks, plans to offer an innovative bandwidth package to corporate customers that includes free voice services.[65] Viatel is a facilities-based international services provider building the Circe network

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[59] *See* Lisa Levenson, *Equant Launches ATM Service in 42 countries* (May 11, 1999) < http://www.totaltele.com >.

[60] *See, e.g.,* Christopher J. Chipelo & Stephanie N. Mehta, *Teleglobe to Spend $5 Billion to Expand its Global Telecommunications Network*, Wall Str. J., May 10, 1999, at B-10 (*WSJ* May 10, 1999 article) (noting that newcomers such as Global Crossing and Qwest are building massive pipelines to transmit voice and data traffic across the United States and the world); David Maloney, *Vendors Poised for Global Operations Role* at Communications Week Int'l (May 10, 1999) < http://www.totaltele.com > (noting that major telecoms equipment vendors are taking decisive steps towards becoming principal operators of global networks they have built for service providers).

[61] *WSJ* May 10, 1999 article at B-10.

[62] Qwest press release, *KPN Qwest Joint Venture Completes First 'EuroRing' Network* (Aug. 3, 1998) < http://www.qwest.com/press >.

[63] *See Global Crossing Ltd. and Frontier Corporation, Application for Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended,* Memorandum Opinion and Order, CC Docket No. 99-264, DA-1930 (rel. Sept. 21, 1999).

[64] GTS press release, *GTS and FLAG Telecom Sign Agreement for Transoceanic Cable Venture* (Jan. 13, 1999) < http://www.gtsgroup.com/news >; GTS press release, *GTS and Esprit Telecom Announce Proposed $4.1 Billion Combination* (Dec. 8, 1998) < http://www.gtsgroup.com/news >.

[65] *See, e.g.,* Vanessa Clark, *Level 3 and Colt Team Up for Network Construction* (May 4, 1999) < http://www.totaltele.com >.

in Europe and has operations in the United States, Latin America, and the Pacific Rim.[66]

38. *Regional providers*: In addition, we find that several carriers that provide only limited services or serve only limited geographic regions could become significant participants in this market. These regional providers offer global seamless services using a variety of different strategies. IDT, a U.S. carrier, is serving South America, the Caribbean, and Asia; Primus operates a global network with digital gateway switches in the U.S., Canada, Australia, the U.K., and Mexico; Star has a proprietary network that extends to 40 countries; Pacific Gateway Exchange has gateway facilities in the U.S., U.K., Russia, and New Zealand; and COLT is a London-based carrier that owns networks throughout Europe.[67]

39. *Self-provisioning:* As an alternative to purchasing a package of global corporate communications from a global seamless service provider, corporate customers can (and do) purchase and manage, through their own telecommunications departments, the component piece-parts of those services from various facilities-based providers.[68] In-house provisioning continues to be a significant source of supply of global seamless services for MNCs. One study found that 80 percent of Fortune 500 companies, for instance, spent up-to half their total telecommunications budgets for in-house provisioning, although the companies expected to reduce these expenditures in the future in favor of outsourcing (*i.e.*, retaining carriers to provide managed voice and data services).[69]

3. Competitive Analysis of the Global Seamless Services Market

40. A merger can have an anticompetitive effect in a given market if it increases concentration in the market to such an extent that the exercise of market power becomes more likely and the ability of competitors to enter the market and constrain the exercise of market power is impeded by barriers to entry. As noted above, concerns that arise in a merger context are also applicable in reviewing a proposed joint venture.[70] Thus, we need to evaluate whether the proposed transaction (1) increases significantly concentration in the market, and, if so (2) whether there are significant barriers to entry into the market. Even if the proposed transaction

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66 *See* News release, *Viatel Receives Final Nod for Circe* (July 14, 1998) < http://www.totaltele.com >; Viatel press release, *Viatel Announces Intention to Build Pan-European Fiber Network* (Feb. 3, 1998) < http://www.sternco.com >.

67 *See* AT&T/BT application at 20-21.

68 AT&T Jan. 19, 1999 *ex parte* letter at 4.

69 CIT Research Ltd, *The Global Market for Corporate Networks, 1998* (1998) at 59-60, 71, 146.

70 *Supra* ¶ 16.

increases significantly concentration in a market, free entry into the market will prevent the ability of the newly-formed entities to act anti-competitively.[71]

a. Market Concentration Analysis

41. We first examine the extent to which the joint venture between AT&T and BT will increase concentration in the market for global seamless services and whether the joint venture will facilitate the exercise of market power. Although we typically examine market share data as the starting point of our analysis, we find that accurate and reliable market share data are not available for this market. Neither C&W nor GTE, both of whom assert that the proposed JV will have market power in the global seamless services market, provide any market share data to support their claims. AT&T/BT estimate that the combined market share of AT&T and BT in the global seamless services market is less than 10 percent.[72] AT&T/BT further state that their combined market share rises to no more than 13.5 percent if IBM's global assets that AT&T acquired are included.[73] We also note that the European Commission estimates that AT&T's and BT's combined market share for global telecommunications services is between 30 percent and 50 percent.[74] As discussed below, however, we find that all these estimates have limitations for purposes of determining market share in the global seamless services market.

42. AT&T/BTs' estimate is derived from two reports that probably overstate the size of the market and understate AT&T/BTs' market share.[75] We note that AT&T acknowledges that its own records show that the CIT report understates its earnings from providing global seamless services.[76] In addition, the CIT study further understates AT&T/BTs' market share by excluding "the MN&S [managed network and support services] revenues of the parent companies from their respective home countries."[77] The CIT report, thus, does not include AT&T's revenues

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71 *See supra* ¶ 19.

72 AT&T/BT application at 21.

73 *See* AT&T/BT April 13, 1999 *ex parte* letter at 9-10, n.18.

74 European Commission press release, "Commission clears BT/AT&T joint venture with conditions in the U.K. market," March 30, 1999, attached to AT&T/BT April 13, 1999 *ex parte* letter.

75 AT&T identified the two reports as: (1) CIT Research, *The Global Market for Managed Network Services, 1998* (1998) (CIT report); and (2) McGraw Hill, *Global VANS Market: 1995 edition* (1996) (McGraw Hill report). AT&T January 19, 1999 *ex parte* letter at 3-5.

76 *See* AT&T/BT April 13, 1999 *ex parte* letter at 9, n.18 (AT&T's proprietary internal estimate of its own sales is higher than the CIT estimate).

77 *See* CIT report, Ch. 2, at 2.

from providing global network services to U.S.-based MNCs and BT's revenues from providing global network services to U.K.-based MNCs.[78] In addition, we note that these reports define two different markets (i.e., "network management & support services" and "global VANS") that do not correspond exactly with the market for global seamless services.[79] Both reports probably overstate the size of the market, and understate the combined AT&T/BT share, by including revenues from companies that provide various network support, facilities management and VSAT management services that are beyond the scope of global seamless services.[80] Finally, even on the basis of the two reports AT&T/BT identified, AT&T/BT have understated the market share contribution from AT&T's acquisition of IBM's global networks. While AT&T/BT cite the CIT report to support their claim that the IBM network will increase the combined AT&T/BT share from 10 percent to 13.5 percent of the global seamless services market,[81] we find that the McGraw Hill report states that, in each year from 1994-1999, IBM's market share alone is approximately 10 percent, AT&T's share is 6-7 percent, and BT/MCI's share is 3-4 percent.[82] For these reasons, we conclude that the two reports do not support AT&T/BTs' contention that the combined AT&T/BT market share is less than 10 percent without including IBM's global network or 13.5 percent including IBM's global network.

43. We also note that, although the EC stated in a press release that it estimated that AT&T/BT had a combined market share of 30 percent to 50 percent. AT&T/BT argue that the EC's estimate is a "worst-case" estimate based on two sources of information: revenue data submitted by six carriers (AT&T, BT, MCI WorldCom, Global One, Equant, and C&W) and a third-party analysis of the expenditures of 200 global MNCs.[83] AT&T/BT assert that the EC significantly understated the size of the market, and overstated the AT&T/BT share, by including revenues from only six carriers. As noted above, we believe that several emerging carriers,

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78 *See id.*

79 Network Management & Support Services (NM&S) is a term describing a range of telecommunications services for business that are outsourced to a specialist supplier. NM&S encompasses customized services for network support, management of voice services, and the management of VSAT and customer owned telecommunications facilities. *See* CIT report, Ch. 1, at 3-4. A VAN (Value Added Network) is a communications network that provides features such as data transport, protocol conversion, alternate routing and network management. *See* McGraw Hill report § 7.4. *See also supra* ¶ 28.

80 C&W reply comments at 5-6 (managed network services are not a substitute for global seamless services). *See also* CIT report, Ch. 7, at 7 (1997 revenues); McGraw Hill report at 433 (1997 revenues).

81 AT&T/BT April 13, 1999 *ex parte* letter at 9-10, n.18.

82 We also note that the McGraw Hill report states that the total market size as $22.9 billion, while the CIT report states that the total market revenues are $13.9 billion. *See* McGraw Hill report at 434; CIT report at Chapter 2, at 2.

83 AT&T/BT April 13, 1999 *ex parte* letter at 10, n.19.

regional providers, and global MNC self-provisioning operations should also be included in our analysis as significant providers of global seamless services. Thus, to the extent that the EC based its estimate on only six carriers, we conclude that for purposes of our analysis the EC estimate may overstate the combined AT&T/BT share of the market.

44. Despite the lack of accurate market share data, however, we find there is substantial evidence that the joint venture will combine the international assets of two significant providers of global seamless services. For instance, GTE states, and AT&T/BT do not dispute, that AT&T and BT will contribute assets worth billions to the JV, including: services to, and facilities in, 237 countries; operating agreements with over 400 carriers; traffic amounting to 25 billion minutes; 200,000 private line circuits; more than 6,000 nodes in 52 countries, covering 1,000 cities; undersea cable systems throughout the world; and customer service and network management operations on four continents.[84] We also note that AT&T/BT estimate that the JV will have 6,500 large global MNC and carrier accounts and earn over $10 billion in annual revenues.[85] Thus, we conclude that the proposed joint venture is likely to increase concentration in the global seamless services market.

45. We are not persuaded, however, by C&W's argument that the proposed joint venture will eliminate a significant provider of global seamless services in the United States. C&W claims that, based on its own experience in bidding for contracts with global MNCs, BT and AT&T are always included among the top three to five potential suppliers and "one or the other will usually win the bid."[86] C&W claims that the proposed JV will eliminate competition between AT&T and BT.[87] C&W, however, offers no evidence to support these claims and AT&T/BT deny them. AT&T/BT argue that, for the most part, AT&T is a U.S distributor, and BT is a European distributor, of global seamless services.[88] AT&T/BT also state that Concert, which BT and MCI jointly owned from January 1995 to September 1998, always had a strong U.S. distributor: MCI was the exclusive distributor until it was acquired by WorldCom and AT&T and MCI then became non-exclusive distributors.[89] BT did not market Concert services

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84 GTE opposition at 7. *See also* C&W opposition at 12.

85 *See e.g.,* GTE opposition at 3, *citing* AT&T news release (July 26, 1998). *See also* AT&T/BT application at 2 ("AT&T and BT have concluded that combining and enhancing their international networks and assets will enable each to compete more effectively in [providing] international telecommunications services ...").

86 C&W opposition at 12.

87 C&W opposition at 11-13.

88 AT&T/BT April 13, 1999 *ex parte* letter at 2.

89 *Id.* at 3, n. 2.

in the U.S. except to customers who contacted BT directly.[90] BT's U.S. revenue from these walk-in customers since September 1998, which amounts to less than 5 percent of Concert's new U.S.-based customers,[91] is not sufficient to make BT a significant competitor in this market. Thus, we find that, in fact, AT&T and BT do not provide "head to head competition" to provide global seamless services to U.S.-based MNCs.[92] Accordingly, we conclude that a joint venture between AT&T and BT would not result in the loss of a significant competitor in the United States. Instead, because AT&T is replacing MCI as BT's U.S. partner and MCI has merged with WorldCom, AT&T and MCI WorldCom will continue to compete in this market.[93] There is insufficient information in the record to find that the joint venture will not result in the loss of a significant competitor in non-U.S. markets. However, we note that, even if the joint venture results in the loss of a significant competitor in those markets, the joint venture will not have an anticompetitive effect because there are no significant barriers to entry.[94]

46. We further note that there is no certainty whether the AT&T/BT JV will be able to "migrate" their current customers onto their planned IP platform. An IP platform differs fundamentally from the circuit-switched technology by which global seamless services are currently provided by AT&T and BT. The services provided by the JV over the IP platform will likely differ substantially in quality, price, and kind from the status quo.[95] MNC customers will doubtlessly evaluate carefully whether to take service under the new terms and conditions that the JV offers or whether to acquire service elsewhere.[96]

b. Barriers to Entry

47. As noted above, a transaction that increases concentration in a market will not have an anti-competitive impact if the ability of competitors to enter that market is

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90 *Id.*

91 *Id.* at 3.

92 *Id.* at 2.

93 AT&T/BT reply at 18 (the joint venture represents no more than a reshuffling of the preexisting relationships among US and foreign carriers).

94 *See infra* ¶¶ 47-51.

95 For instance, the IP platform may allow customers to choose different grades of voice quality, priced accordingly, or different kinds of employee access and security arrangements.

96 According to the Finnegan affidavit, MNC customers are "quite willing" to change their global communications suppliers if they can obtain better terms or services from another supplier. Finnegan affidavit at 1-5.

unconstrained.[97] The ability of competitors to enter freely depends on their ability to obtain, at reasonable terms and prices, inputs, as well as firm-specific assets and capabilities, necessary for the provision of service in that market. Further, as we stated in *MCI WorldCom*, the provision of services to larger business customers depends in large part on the ability to obtain critical inputs such as international transport capacity and operating agreements with carriers on the foreign end, as well as the technical ability to provide the services demanded by larger business customers.[98] Although we concluded that the proposed joint venture will increase concentration in the global seamless services market, we now find that, because competitors can freely obtain the necessary inputs and they have the technical assets and capabilities to provide global seamless services, the JV is unlikely to have the ability to act anticompetitively in this market.

48. First, we must determine if AT&T/BT has the ability to act anticompetitively in the international transport capacity market. In the *MCI WorldCom Order*,[99] we examined in great detail the international transport capacity market, reviewing the Atlantic, Pacific, and Latin American/Caribbean markets. On the trans-Atlantic route, we found that, by the end of 1999, AT&T and BT would own 7.8 percent, and 3.7 percent, respectively, of international transport capacity.[100] By contrast, we found that Global Crossing (with 40 percent), MCI WorldCom (with 23.3 percent) and C&W (with 15.9 percent) would have larger market shares for capacity on this route.[101] We note that there have been no changes in the ownership of existing cables since September 1998. Thus, we find that the numbers quoted above are reasonably accurate market share descriptions of U.S.-U.K. international transport capacity at present. Using these numbers, we calculate that AT&T/BTs' combined ownership of U.S.-U.K. international transport capacity is 11.5 percent. We also determine that the proposed joint venture would increase the HHI concentration, calculated on the basis of ownership of cable capacity, by 60 points, from 2,480 to 2,560.[102] As we noted in *MCI WorldCom,* however, "using only ownership shares is likely to

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97 *See supra* at ¶ 40.

98 *MCI WorldCom Order,* 13 FCC Rcd at 18,099, ¶¶ 131-132.

99 *Id.*, 13 FCC Rcd at 18,072-91, ¶¶ 82-114.

100 *Id.*, 13 FCC Rcd at 18,077, ¶ 92.

101 *Id.*, 13 FCC Rcd at 18,077, ¶ 94.

102 *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41,558, § 1.51 (a)-(c). A market's HHI is calculated by summing the squares of the individual market shares of all the participants. Market concentration and the increase in market concentration resulting from a merger can be an indicator of the likely competitive effects of a merger. Under the *1992 Horizontal Merger Guidelines*, if the post-merger HHI is below 1000, the market is considered unconcentrated and the merger requires no further analysis; if the post-merger HHI is between 1000 and 1800, the market is considered moderately concentrated and an increase in HHI of more than 100 signals potential significant competitive concerns; and if the post-merger HHI is above 1800, the market is considered highly concentrated and an increase in HHI of more than 50 signals potential significant competitive concerns. We have used HHI analysis in

increase the level of concentration in the transport market compared to the level if IRU's were taken into account."[103] Thus, we also calculate market shares and HHI based on IRU leasehold interests. By this measure, we find the market share distribution of the largest IRU leaseholders is as follows: MCI WorldCom 26.6 percent; C&W 12.2 percent; AT&T 8.1 percent; Teleglobe 5.6 percent; Level 3 5.0 percent, DT 4.6 percent, and BT 3.8 percent. In addition, Global Crossing holds 16.4 percent of IRUs. We also determine that the proposed joint venture would increase the HHI concentration, calculated on the basis of IRU leaseholds of U.S.-U.K. cable capacity, by 60 points, from 1,290 to 1,350.[104] We note that according to the 1992 *Horizontal*

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numerous contexts as an initial means of measuring the significance of changes in market concentration. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4419-20, ¶¶ 120-21 (1997); *Amendment of Parts 20 & 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, 11 FCC Rcd 7824, 7869-73, 7899-904 (1996). The HHI has also been used by antitrust courts as a basic tool and has been called "a standard measure of market concentration," *Western Resources, Inc. v. Surface Trans. Board*, 109 F.3d 782, 785 (D.C. Cir. 1997), and "[t]he most prominent method of measuring market concentration." *FTC v. University Health, Inc*., 938 F.2d 1206, 1211, n.12.

[103] *MCI WorldCom Order*, 13 FCC Rcd at 18,082-84, ¶ 104.

[104] This calculation is based on the data in the *MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296, with adjustments to take into consideration the following exceptions:

For the Gemini cable

(i) In response to AT&T's assertion that it has not purchased any capacity from Gemini, we reduced the number of circuits allocated to AT&T by 1,008 E-1 circuits. *See* AT&T/BT January 19, 1999 *ex parte* letter.

(ii) Based on news reports, we assigned these 1,008 E-1 (or 16 STM-1) circuits to Teleglobe. *See JANET press release, CANTAT3 Outage- Feb 21/22 1999* (Mar. 1999). < http://www.ja.net/press_release/break_update.html >.

For the AC-1 cable

(iii) In response to information provided by AT&T/BT, we assigned 126 E-1 circuits to AT&T, instead of 2,646 E-1 circuits, and removed 63 E-1 circuits from BT. *See* AT&T/BT January 19, 1999 *ex parte* letter.

(iv) We also assigned 1,638 E-1 circuits to MCI WorldCom, instead of 2,898 E-1 circuits. Based on a Global Crossing press release, we also assigned 1,260 E-1 circuits to Teleglobe. *See* Global Crossing press release, *Teleglobe Purchases Capacity on Global Crossing AC-1 Network* (Mar. 24, 1998) < http://www.globalcrossing.com/pressreleases/pr_032498.asp >.

(v) We also assigned 1,134 E-1 circuits to DTAG, instead of 63 E-1 circuits as assigned in the *MCI WorldCom Order,* based on two additional Global Crossing press releases. *See* Global Crossing press release, *Global Crossing and Deutsche Telekom Announce Package Agreement* (Dec. 22, 1997) < http://www.globalcrossing.com/pressreleases/pr_12298.asp >; Global Crossing press release, *Global Crossing Announces Second Agreement with Deutsche Telekom for Atlantic Capacity* (Sept. 9, 1998) < http://www.globalcrossing.com/pressreleases/pr_090998.asp >; *MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296. The news releases indicate that DTAG has signed two contracts with Global Crossing for approximately $90 million. We used Global Crossing's pricing information to convert this dollar amount to capacity amounts (assuming the lowest rate of $5 million per STM-1).

(vi) We also assigned an equal share of 315 E-1 circuits to the three Unisource shareholders - KPN, Telia, and Swisscom, based on a Global Crossing press release. *See* Global Crossing press release, *Global Crossing Signs $100 Million Dollar Agreement with Unisource Shareholders* (Dec. 19, 1997) <

Merger Guidelines, a transaction that increases HHI concentration by 60 points on the U.S.-U.K route would not raise significant competitive concerns. Although we do not include them in our analysis of market concentration, we also note that several additional transatlantic cables are in the planning stages and are scheduled to be in service between late 1999 and late 2001.[105] Thus, we conclude that AT&T/BT does not have the ability to act anticompetitively in the U.S.-U.K. international transport capacity market.

49. We also find that AT&T/BT do not have the ability to act anticompetitively on the Pacific and Latin/American/Caribbean routes. In the Pacific, AT&T owns 12.1 percent and BT owns 0.4 percent, for a combined share of 12.5 percent of capacity. Other owners of capacity on the Pacific route include: MCI WorldCom 9.6 percent, KDD 7.4 percent, Sprint 6.0 percent, and 10 other carriers each with 5 percent. Similarly, in the Caribbean, AT&T owns 20.8 percent, BT owns 0.1 percent, MCI WorldCom (including Embratel) owns 42.3 percent and Sprint owns 14.4 percent. Because BT's ownership of cable capacity amounts to 0.4 percent on

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http://www.globalcrossing.com/pressreleases/pr_121998.asp >. The press release announces a $100 million purchase agreement between the three shareholders to purchase substantial transatlantic capacity for voice, high-speed data and video transmission; therefore, we converted that to 15 STM-1s (945 E-1s, or 315 per partner).

(vii) We also assigned 4 STM-1s (252 E-1s) to Qwest, based on a Global Crossing press release. *See* Global Crossing press release, *Qwest and Global Crossing to Swap Transatlantic High Capacity Fiber between U.S. Cities and Europe* (Apr. 7, 1998) < http://www.globalcrossing.com/pressreleases/pr_040798.asp >.

(viii) Based on Level 3's Affidavit filed in the Japan-US Cable application, we assigned 32 STM-1s (2,016 E-1s) to Level 3 Communications, Inc. *See* SC-LIB-19981117-00025, Exhibit 5, Declaration of Donald H. Gips (Mar. 8, 1999).

(ix) We also assigned 1 STM-1 (63 E-1) each to Viatel and PSINet Inc based on their Affidavits filed in the Japan-US Cable application. *See* SC-LIB-19981117-00025, Exhibit 4, Declaration of Michael J. Mahoney, Viatel, Inc.; Exhibit 6, Affidavit of John B. Muleta, PSINet (Mar. 8, 1999).

(x) As we did in the *MCI WorldCom Order*, we assigned the remaining 29 STM-1s to 10 unknown carriers. *See MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296. This is because, after counting the newly identified customers from above, we found there were 10 more carriers needed to match the information we received from Global Grossing.

(xi) Finally, we assigned the unsold capacity of 105 STM-1s or 6,615 E-1 circuits to Global Crossing. This was calculated by subtracting 32 STM-1s (the sale to Level 3) and 12 STM-1s (the sale to DTAG) from our previously identified unsold capacity of 149 STM-1s or 9,387 E-1 circuits in our *MCI WorldCom Order*. We note here that, just as in the calculation we performed in the *MCI WorldCom Order,* we still do not have the full information on all IRU accounts; thus we consider our HHI value to be a conservative one (i.e., the actual HHI value could be lower than that which is shown here). *See MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296.

[105] *See MCI WorldCom Order,* 13 FCC Rcd at 18,085-86, ¶ 106 (Project OXYGEN is building a private cable system with standard capacity of 640 Gbps in various segments to link 78 countries in all continents; a consortium of carriers has applied to build a cable, TAT-14, with capacity of 640 Gbps to connect the U.S., U.K., France, Germany, the Netherlands, and Denmark by the end of 2000).

the Pacific route and 0.1 percent on the Latin American/Caribbean route, and there is no evidence that BT's share of cable capacity will be significantly greater if measured on an IRU basis, we do not further analyze AT&T/BTs' ability to act anticompetitively on these routes.[106] Thus, we conclude that the JV will not have sufficient capacity on any route to exercise market power over international transport capacity. Accordingly, we do not agree with Equant that we should require the JV provide unbundled access to international transmission circuits.[107]

50. Second, we also conclude that the JV's competitors have the ability to obtain operating agreements from foreign carriers. As we have noted previously, carriers are generally able to obtain operating agreements to terminate traffic or use alternative arrangements to provide international services.[108] Furthermore, as countries implement their market access commitments made as part of the WTO Basic Telecom Agreement, U.S. carriers will be able to obtain operating agreements from new entrants as well as incumbent carriers in these countries. In addition, carriers have been successful in providing international service through alternative arrangements such as switched hubbing through a third country.[109] Thus, we conclude that the ability to obtain operating agreements is not a barrier to entry into the global seamless services market for the JV's competitors.

51. Finally, we conclude that many carriers have the technical know-how to provide global seamless services. As we stated in the *MCI WorldCom Order*, the special assets and capabilities that are important attributes in serving residential customers are less important in the larger business market.[110] Particularly for sophisticated customers like global MNCs, retail assets and capabilities are far less important than price and service factors. Thus, we do not agree with C&W that barriers to entry to this market are high or that the JV will have the ability to lock-in its customers.[111] C&W does not submit any evidence to support this claim. To the contrary, global MNC customers are increasingly using multiple vendors to supply their global

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106 We thus do not calculate increases in concentration, as measured by the HHI, on the Pacific and Caribbean/Latin American routes.

107 *See* Equant reply at 5-6.

108 *See MCI WorldCom Order*, 13 FCC Rcd at 18,093, ¶¶ 117, 131. *See also See AT&T International Non-Dominance Order*, 12 FCC Rcd at 17,981-82, ¶¶ 50-51 (finding that multiple U.S. carriers have operating agreements to nearly all foreign countries for the provision of IMTS); *International Competitive Carrier Policies*, 102 F.C.C.2d 812, 835, ¶ 56 (1985) (*International Competitive Carrier*) (finding that foreign carriers are likely to enter into operating agreements for the provision of non-IMTS services).

109 *See AT&T International Non-Dominance Order*, 12 FCC Rcd at 17,982, ¶ 51.

110 *See MCI WorldCom Order*, 13 FCC Rcd at 18,099-100, ¶ 132.

111 C&W opposition at 12.

seamless services needs.[112] Furthermore, we note that global MNCs have multimillion-dollar budgets for purchasing global seamless services and are staffed by in-house experts able aggressively to seek out competing providers.[113] Thus, we conclude that the possession of technical assets and capabilities is not a barrier to entry into the global seamless services market for the JV's competitors.

c. Application Program Interfaces

52. We consider in this section GTE's and Equant's allegations that the JV will be able to monopolize the global seamless services market through the adoption of proprietary application program interfaces (APIs), described below.[114] GTE claims that AT&T/BT have an initial advantage in the global seamless services market and, because of this, will be able to establish their proprietary APIs as the industry standard, allowing the JV to dominate the global seamless services market.[115] We find that AT&T/BT do not have an initial advantage in the global seamless services market that would allow them to establish their APIs as the industry standard. Distinguishing between API calls and API programs, as described below, we find that the JV is unlikely to adopt proprietary API calls and would be unable to use proprietary API calls to lessen competition even if it did adopt them. We also find that, although the JV is likely to adopt proprietary API programs, such programs will not enable the JV to lessen competition. As a result of these findings, we are not persuaded by GTE's and Equant's allegations.

53. An IP telecommunications network can be conceived of as having three layers: applications programs, APIs, and an IP platform. The top layer consists of applications programs, which are software packages that provide desired telecommunications services to customers.[116] The middle layer consists of APIs, which generally consist of software providing a

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112 *See supra* ¶ 25.

113 *See, e.g.*, Finnegan affidavit at 2.

114 GTE opposition at 3-4, 10-17. Equant Reply at 8-10. GTE argues that the merger should not be approved because of the likelihood that it will result in substantial competitive harm not outweighed by any corresponding pro-competitive justification. GTE opposition at 2. Equant agrees with GTE's analysis and urges the Commission to impose non-discrimination and disclosure requirements on AT&T's and the JV's use of APIs. Equant reply at 10. Because Equant's analysis is similar to GTE's, our discussion refers to GTE's analysis only.

115 GTE opposition at 3-4, 12-14. GTE also claims that AT&T and BT would be able to achieve dominance in the market for APIs and as a wholesale provider of "voice over IP" services. GTE opposition at 16-17.

116 Upon implementation of an IP telecommunications network, application programs will enable customers to obtain such services as voice over IP, advanced messaging services, customizable service quality and security, e-commerce, and global roaming. AT&T/BT, *Technical White Paper* at 5 (1998) < http://att-bt-globalventure.com/technology/whitepaper.doc > (*Technical White Paper*). Application programs may be developed by customers, carriers, or third parties. *Id.* at 5; AT&T/BT reply at 21-22.

set of functions necessary for the operation of applications programs on the IP platform.[117] The bottom layer is the IP platform, which consists of software and hardware that support the higher layers and provides transmission and routing of messages.

54. GTE claims that AT&T/BT will adopt proprietary APIs.[118] By the term "proprietary," GTE means that AT&T/BT will not develop APIs that are operable on rival networks[119] or that AT&T/BT will not make their APIs available to rival carriers on reasonable terms and prices[120] or at all.[121] According to GTE, AT&T/BT's large actual and potential base of customers will motivate software developers to write application programs specially tailored to AT&T/BTs' proprietary APIs[122] and incompatible with the IP systems of competitors. According to GTE, the existence of a "rich array" of application programs compatible only with the JV's system will draw ever more customers to the JV's system,[123] ultimately leading to a phenomenon called "tipping."[124] "Tipping" is defined as the tendency for a system with an initial edge over

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[117] According to *whatis.com*, a world wide web site which contains definitions of Internet terminology, an API is "the specific method prescribed by a computer operating system or by another application program by which a programmer writing an application program can make requests of the operating system or another application." *See* < http://www.whatis.com >. According to the *CyberDictionary*, an API is "software that enables an applications program to communicate with another program or the operating system." David Morse, ed., *CyberDictionary*, Knowledge Exchange, LLC, Santa Monica, California, 1996, p. 16. According to *Newton's Telecom Dictionary*, an API is "software that an application program uses to request and carry out lower-level services performed by the computer's or a telephone system's operating system." Harry Newton, *Newton's Telecom Dictionary*, Flatiron Publishing, New York, March 1998, p. 55. For instance, APIs are used by application programs to accomplish tasks such as retrieving a file or querying a database. APIs are used on personal computers as well as IP platforms. For instance, the Windows operating system has over a thousand APIs. Each API performs a different function (*e.g.*, opening a window or managing icons and menus). Each application program (*e.g.*, WordPerfect for Windows or EXCEL) uses the same API to perform a given task (*e.g.*, opening a window). Peter Norton *et al.*, *The Peter Norton PC Programmer's Bible*, Microsoft Press, Third Ed., 1993, pp. 440-441 and *Newton's Telecom Dictionary*.

[118] GTE opposition at 4 and 11-12.

[119] *Id.* at 11.

[120] *Id.* at 16.

[121] *Id.* at 4.

[122] *Id*. at 12.

[123] Certain systems, such as computer or telephone systems, become more attractive to customers as more customers use them, a phenomenon called "network effects" in the economics literature. *See* Michael Katz and Carl Shapiro, *Systems Competition and Network Effects,* Journal of Economic Perspectives, Vol. 8, No. 2, pp. 93-115. Network effects may be self-reinforcing, *i.e.,* a system's increased attractiveness may cause subscribership to increase, which, in turn, may cause a further increase in the attractiveness of the system.

[124] GTE opposition at 4 and 12.

incompatible, rival systems to become an industry standard and thus achieve market dominance.[125] The end result, according to GTE, will be that the JV will attain a monopoly position, with their rivals relegated to a fringe position."[126]

55. Because APIs permit the application programs to interact with the network, APIs are a crucial input in the provision of communications services over an IP platform. In essence, GTE argues that AT&T/BTs' initial advantage in the global seamless services market will allow them to establish their proprietary APIs as the industry standard, thus giving AT&T/BT control over this input market and allowing AT&T/BT to extend their market power into the global seamless services market, which relies on APIs as an input.

56. We are not persuaded by GTE that AT&T/BT have an initial advantage that will allow them to tip the global seamless services market through the use of proprietary APIs. AT&T/BT are not alone in developing a global IP telecommunications network[127] and there is no evidence in the record that they are the current leaders.[128] Also, although AT&T and BT are significant competitors in the global seamless services market, it is not at all clear that the JV will be able to "migrate" customers onto its planned IP telecommunications network or that it has more favorable access to important MNC accounts than that afforded to other major market participants.[129] Even though the JV will have considerable size and resources, this is no guarantee of success in the rapidly changing global seamless services market.

57. Neither are we persuaded by GTE that AT&T/BT will use proprietary APIs to lessen competition, as we explain in detail below. Although there is no industry consensus on terminology regarding APIs, it is useful to distinguish between API calls and API programs.[130]

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125 *Id.* at 12. *See also* Katz and Shapiro, *Systems Competition and Network Effects*, pp. 105-106.

126 *Id*. at 4.

127 *See WSJ* May 10, 1999 article at B10. According to this article, Teleglobe aims to build a "next generation" global network based on Internet technology. *See also* C&W April 13, 1999 press release (Cable and Wireless announced investment of $670 million to develop a next generation high-capacity Internet network that will fully integrate Internet, data, voice, and messaging communications).

128 AT&T/BT claims that "[a]lthough AT&T and BT *plan* to roll out an IP-based network in the year 2000, MCI WorldCom, Sprint and others already have deployed such facilities." AT&T/BT reply at 25-26. In his affidavit on behalf of AT&T/BT, Tom London lists MCI WorldCom, C&W, Global One, and GTE as having significant head starts. Affidavit of Tom London at 3 (London affidavit), attached to AT&T/BT reply. We make no finding regarding these claims because of insufficient supporting information in the record.

129 *Supra* ¶ 46.

130 *See e.g.,* Jonathan Band and Masanobu Katoh, *Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry* at 8 (1995) (Band and Katoh) ("[I]nterfaces should be thought of as possessing two

An API call is a request by the applications program for a needed task to be performed over the IP platform.[131] An API program is a computer program that actually performs the requested task over the IP platform. Different API programs can support the same API call. GTE does not distinguish between API calls and programs. AT&T/BT distinguish between APIs (what we describe here as API calls) and API source code or interface programs (what we describe here as API programs).[132] AT&T/BT claim that their API calls will not be proprietary[133] but acknowledge that their API programs may be proprietary.[134] We consider first the issue of proprietary API calls and then proprietary API programs.

58. AT&T/BT indicate that they will use non-proprietary API calls, *i.e.*, that they will use API calls developed by open industry standards-setting bodies in so far as possible[135] and that they will not limit access to the API calls supported by their IP platform.[136] AT&T/BT state that they will adopt open standards that will "facilitate interoperability between the Global Venture's network and the networks of others, including both distributors and competitors."[137] Furthermore, AT&T/BT give a number of persuasive reasons why adoption of proprietary API calls would be counterproductive to their efforts to compete in the global seamless services market. According to AT&T/BT, use of proprietary API calls would delay the roll-out of the

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dimensions. On the one hand is the interface *specification*, the technical description of the permissible input or output. On the other hand is the interface *implementation*, the actual means by which the [operating system] program receives the inputs and produces the outputs.").

[131] Every API call must be precisely specified and formatted, *i.e.*, standardized, in order to be intelligible to the IP platform.

[132] *Ex parte* letter from James E. Graf II, BT North America, Inc. and Lawrence J. Lafaro, AT&T Corp., to Magalie Roman Salas, Secretary, FCC, at 5, n. 10 (May 28, 1999) (AT&T/BT May 28 *ex parte* letter).

[133] AT&T/BT reply at 21-22; London affidavit at 2.

[134] AT&T/BT May 28, 1999 *ex parte* letter at 5 and n. 10.

[135] "[W]herever possible, the Global Venture's plans to use existing and developing public domain, IP-based standards sanctioned by the Internet Engineering Task Force ("IETF") and other standards-setting bodies." London affidavit at 2. *See also* numerous statements in *Joint Technical White Paper*, and AT&T/BT May 28, 1999 *ex parte* letter at 4-5.

[136] London affidavit at 2. Copyright protection is not generally extended to interface specifications (*e.g.*, API calls). *See* Band and Katoh at 126, 132. Hence, in most cases, API calls can be "proprietary" only in the sense of being secret (and thus unpublished) or not widely accepted (*i.e.*, not approved by an open industry standard-setting body).

[137] London affidavit at 3.

JV's services;[138] drive away MNCs that fear being locked into a system reliant on proprietary API calls;[139] limit the JV's ability to attract partners and distributors;[140] limit the JV's ability to access the industry-wide pool of innovations;[141] and incur significant risk that JV's proprietary API calls will be forced out by open standards.[142] Based on these considerations, we are convinced that AT&T/BT are not likely to use proprietary APIs in an anti-competitive manner successfully.

59. AT&T/BT acknowledge that, due to rapidly developing and highly competitive markets, they may choose to deploy a new service or feature even before the industry standards-setting process has concluded and that they wish to "shape the competitive landscape" by getting industry standards-setting bodies to adopt innovative API calls originated by AT&T/BT.[143]

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[138] Proprietary standards would greatly delay the JV's offering of services demanded by MNCs. AT&T/BT reply at 23. An open standards approach, in contrast, would build on the enormous body of open, public domain IP standards and would allow the JV to get its services to market faster and at a lower cost. *Id.* at 22-23. Delay would have a crippling effect on the JV because MCI WorldCom, GTE, and C&W have a significant head start through their control of most Internet backbone facilities, customers, and traffic. AT&T/BT reply at 23-24. Open standards facilitate the JV's ability to get "off-the-shelf" equipment and software, which would be less expensive and easier to procure than non-standard equipment and software. *Id.* at 24; London affidavit at 4.

[139] The global seamless services market is comprised of sophisticated corporate clients who would not consent to be "locked in" to systems that did not use open standards, which could limit their ability to use "multi-sourcing," and short-term contracts, *i.e.*, obtain competitive sources of supply. AT&T/BT reply at 26-27.

[140] AT&T/BT state that open standards maximize the ability of the JV to attract distributors and partners. *Id.* at 23. "It is a lot easier for worldwide distributors and partners to tap into the venture's network and services through open standard software and interfaces than it is for these distributors to have to adapt their hardware and software to another carrier's proprietary network and system." *Technical White Paper* at 4.

[141] AT&T/BT state that open standards is the only approach that would enable the JV to obtain the benefits of innovations produced by the entire industry. AT&T/BT reply at 23. "Instead of just one or two companies working on improvements to a proprietary set of standards, many different companies and literally millions of people push the open IP-based standards forward...[w]ith proprietary standards, the rate of innovation on the Global Venture's network almost surely would lag the innovation rates on open IP-based networks." London affidavit at 4-5.

[142] AT&T/BT state that adoption of proprietary standards will lead to failure, especially given the recent history of the IP marketplace, where market forces have rewarded open standards and driven out proprietary standards and are likely to continue to do so. AT&T/BT reply at 20. For a review of recent instances in which open standards have prevailed over proprietary standards in the Internet marketplace, *see* London Affidavit at 5-6. Adoption of proprietary standards is very risky because of the winner-take-all tendency in markets prone to tipping. Affidavit of Janusz Ordover & Robert Willig at 14 (Ordover and Willig affidavit), attached to AT&T/BT reply. Neither AT&T nor BT have advantages that would allow them to overcome market forces disposed to open standards, *e.g.*, a first mover ("first-to-market") advantage in the global seamless services market, control of significant Internet technologies, or control of applications software, which are being developed primarily by third parties. Ordover and Willig affidavit at 23.

[143] AT&T/BT May 28 1999 *ex parte* letter at 5 and London affidavit at 6.

AT&T/BT state, however, that such non-standard API calls will be published and so will be no less open than those endorsed by a standards-setting body.[144] Prior to adoption by an industry standards-setting body, API calls may be open in the sense of freely accessible yet not open in the sense of widely accepted and operable on rival networks. It is conceivable that if AT&T/BT enjoy early technological and commercial success with their IP network, they may be able to dominate the standards-setting process, making the standards-setting process a ratification of their own corporate decisions and guaranteeing, for example, that they are first-to-market with new services. However, there is no evidence in the record to support the likelihood of such an eventuality. Also, as discussed above, AT&T/BT do not have an initial advantage over their rivals in the provision of global seamless services over an IP network. Therefore, abuse of the standards-setting process is as likely to be caused by any significant competitor in the global seamless service market as by AT&T/BT. We could not guard against such potential abuse by rejecting the proposed transaction, as suggested by GTE, or imposing non-discrimination and disclosure requirements regarding APIs solely on the JV, as suggested by Equant.

60. As mentioned above, AT&T/BT acknowledge that their API programs may be proprietary. We are, however, unpersuaded by GTE's argument that the use of proprietary API programs by AT&T/BT poses a risk to competition in the global seamless services market. In the theory of dynamic competition, the profit motive impels entrepreneurs to develop innovations, such as proprietary API programs, which in turn increase consumer welfare.[145] As long as applications programs rely on non-proprietary API calls, rivals have the option of supporting those API calls on their IP platform by obtaining API programs in the marketplace or developing their own API programs. Thus, along with contributing to technical progress, proprietary API programs create no insurmountable barriers to entry that could lessen or significantly postpone competition in the global seamless services market.[146]

61. In summary, we are not persuaded by GTE's arguments. We find that AT&T/BT

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144 AT&T/BT May 28 1999 *ex parte* letter at 5, n. 11.

145 The Supreme Court has recognized this idea in the context of intellectual property law. *See Mazer v. Stein,* 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). We note that even with open standards, innovative proprietary software may render rivals' systems partly obsolete. This is an inevitable result of competition in a market economy and is not anticompetitive.

146 As two authors have noted, federal law affords interface implementations (*e.g.,* API programs) greater copyright protection than interface specifications (*e.g.*, API calls). *See* Band and Katoh at 130-31. As Band and Katoh suggest, an important rationale behind the courts' distinction is the same as ours, namely that non-proprietary interface specifications are essential for interoperability, and thus competition, but non-proprietary interface implementations are not.

do not have an initial advantage in the global seamless services market which would enable them to use APIs to compete unfairly; that AT&T/BT will be unable to use proprietary API calls to exclude competitors from access to desirable applications programs; and that the development of proprietary API programs by AT&T/BT will not create barriers to entry or otherwise impede competition in the global seamless services market. We believe that precluding the proposed transaction, as GTE suggests, or imposing conditions on the development and use of API calls or programs by the JV, as Equant suggests, could interfere with the ability of global seamless services customers to obtain desired services and could reduce innovation, because it would eliminate or handicap a significant market participant. We find, therefore, no basis in GTE's arguments for rejecting the merger or imposing non-discrimination and disclosure requirements on the JV regarding APIs.

B. U.S.-U.K. Route

62. We consider in this section the competitive effects of the proposed joint venture on the U.S.-U.K. route. In particular, we consider C&W's claim that AT&T and BT will raise rivals' costs on the U.S.-U.K. route by using the joint venture to self-correspond. As the Commission stated in the *BT/MCI Order*, a merger can have an anticompetitive effect if it increases either the incentives or the ability of the integrated firm to raise the costs of its rivals to the detriment of consumer welfare.[147] We are not persuaded here by C&W's claim, however, that AT&T and BT will be able successfully to raise their rivals' costs on the U.S.-U.K. route by using the joint venture to self-correspond. We further find that the joint venture is consistent with Commission policy to encourage the movement away from the traditional accounting rate regime and toward competitive alternatives, including end-to-end provisioning, for the termination of international traffic.

63. C&W argues that, if the proposed joint venture is approved, AT&T and BT would engage in a strategy to raise rivals' costs in order to insulate themselves from accounting rate reductions and to maintain supra-competitive prices in the retail market.[148] C&W contends that AT&T and BT could execute such a strategy by terminating all of AT&T's traffic on the U.S.-U.K. route with BT rather than terminating some AT&T traffic with rivals of BT, including C&W. According to C&W, an exclusive AT&T/BT arrangement would force C&W to incur higher settlement outpayment because its U.K.-U.S. traffic flows would not be offset by AT&T return minutes from the United States.[149] In order for such a strategy to be successful, AT&T and

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147 *BT/MCI Order*, 12 FCC Rcd at 15,410, ¶156.

148 C&W opposition at 7-8. C&W states that "the result of the joint venture's strategy will be to erect a price umbrella over the joint venture and permit it to charge above-cost prices to consumers over the long term." *Id.*

149 C&W states that AT&T currently accounts for nearly 57 percent of the minutes C&W receives from U.S. carriers for termination in the U.K. Given this high percentage, C&W contends that it could make up for the loss of

BT would have to ensure that C&W and other rivals could not terminate their traffic in the United States at low rates or offset lost revenues in the U.K. termination market by replacing AT&T inbound-minutes with minutes from other U.S. carriers. Market conditions on the U.S.-U.K. route, however, make it highly unlikely that AT&T and BT could successfully engage in a strategy to raise rivals' costs.

64. The U.S.-U.K. route is one of the most competitive in the world, and there are many alternatives to AT&T for termination of traffic in the United States. C&W may terminate traffic with many facilities-based carriers in the U.S.; it may terminate traffic via ISR at very low rates; and it may build its own facilities in the U.S. and self-correspond. Given the level of competition on the U.S.-U.K. route and the availability of ISR, it is highly unlikely that the joint venture could successfully maintain prices to terminate traffic in the United States that are above-cost, as C&W argues. Contrary to C&W's claim,[150] we expect that AT&T's competitors in the U.S. market for termination of international traffic would respond to any strategy to raise rivals' costs by undercutting AT&T's price to terminate traffic in the United States.

65. On the U.K. end of the route, there are buyers of U.K. termination service other than AT&T. We are not convinced, however, by C&W's argument that "the ability of C&W to make up the shortfall in return traffic by dealing with other carriers is fatally limited by AT&T's dominant share of the U.S.-U.K. market and the lack of sufficient non-AT&T traffic."[151] Given the level of competition on the U.S.-U.K. route, we expect that U.S. carriers will seek the lowest cost alternative for terminating traffic in the United Kingdom. Thus, if C&W offers low cost termination, it should be able to attract traffic from U.S. carriers. Moreover, we note that the U.S.-U.K. market has been growing at a rapid pace, approximately 14 percent annually, since 1991.[152] As a result, there is increasing opportunity for C&W and other rivals of BT to terminate non-AT&T minutes in the United Kingdom.[153]

AT&T traffic only by persuading all of AT&T's competitors to shift all of their traffic to C&W. C&W opposition at 5.

[150] C&W opposition at 3. C&W contends that AT&T's rivals in the U.S. market are unlikely to cut their termination rates to incremental cost in response to an AT&T price increase to BT's competitors, and instead are more likely to charge the same price as AT&T or some lower price that still exceeds incremental cost.

[151] C&W reply at 3.

[152] *See* Linda Blake & Jim Lande, FCC, *1997 Section 43.61 International Telecommunications Data* (1998); Linda Blake & Jim Lande, FCC, *International Communications Traffic Data for 1991* (1992).

[153] We also note that, contrary to C&W's claim, the terms of the Framework Agreement do not require the joint venture to purchase all of its termination services from AT&T or BT. As AT&T/BT note, the joint venture "is free to purchase termination services at better prices, quality or standards of service" than those offered by its parents. AT&T/BT reply at 29; *see also Framework Agreement* at Article 10.1(b). Thus, C&W and other rivals are not prohibited by the terms of the Framework Agreement from continuing to compete to terminate AT&T's traffic in the United Kingdom.

66. C&W urges the Commission to impose the proportionate return requirement of the International Settlement Policy (ISP)[154] between AT&T and the joint venture in their dealings with BT for some period of time in order to prevent AT&T and BT from engaging in a strategy to raise rivals' costs. In light of our conclusion that C&W has not shown that AT&T and BT will be able successfully to engage in a strategy to raise rivals' costs on the U.S.-U.K. route through self-correspondence, we decline to impose a proportionate return requirement that would limit the ability of AT&T and the joint venture to self-correspond.

67. We also note that the proportionate return condition urged by C&W would be contrary to recent Commission policies lifting regulations on U.S. carrier accounting rate negotiations. The Commission recently concluded in its *ISP Reform Order*[155] that, on routes where there are competitive alternatives to terminate traffic, the Commission should not impose regulatory burdens on the settlement of international traffic and instead should let market forces dictate what arrangements U.S. carriers enter into with their foreign correspondents. Specifically, the Commission found that there is no reason to require continued compliance by U.S. carriers with the ISP, including the proportionate return requirement, on routes where rates to terminate international traffic are at least 25 percent below the benchmark rates adopted by the Commission.[156] The Commission concluded that the ISP is not necessary to prevent anticompetitive behavior on routes where there are competitive alternatives to terminate traffic and, in fact, the ISP could hinder the further development of competition on such routes.[157] In addition, the Commission has found that competition is best promoted by breaking the link between the markets for outbound and inbound calls that is required by the ISP's proportionate return requirement. To that end, Commission policy has sought to foster separate competitive markets for termination and origination of international minutes in the United States.[158]

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154 The ISP requires uniform accounting rates, uniform terms for the sharing of tolls, and uniform settlement rates among U.S. carriers providing the same service to the same foreign point. The ISP also requires that U.S. carriers accept only their proportionate share of return traffic. *See Implementation of Uniform Settlements Policy for Parallel International Communications Routes,* 51 Fed. Reg. 4736 (1986) (*1986 ISP Order); Reconsideration,* 2 FCC Rcd 1118 (1987); *Further Reconsideration,* 3 FCC Rcd 1614 (1988). *See also* 47 C.F.R. § 43.51(e) (1998).

155 *1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148 and CC Docket No. 90-337, Report and Order on Reconsideration, FCC 99-73 (rel. May 6, 1999) (*ISP Reform Order*).

156 *See ISP Reform Order,* FCC 99-73 at ¶¶ 55-58.

157 *Id.*, FCC 99-73 at ¶¶ 18, 52-58.

158 *See, e.g.*, *Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996) (*Policy Statement*); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996).

68. C&W has provided no reason to question the application of these policies to the U.S.-U.K. route, where there are many alternatives to AT&T for termination of traffic in the United States and to BT for termination of traffic in the United Kingdom. As noted above, there are several facilities-based carriers to terminate traffic on both ends of the U.S.-U.K. route and, in both the United States and the United Kingdom, carriers may provide end-to-end service by purchasing or leasing facilities to terminate their own traffic.[159] In addition, both the United States and United Kingdom permit carriers to terminate international traffic via International Simple Resale (ISR) arrangements.[160]

69. C&W also urges the Commission to require AT&T and BT to divest, at cost, the half-circuits they maintain with other correspondent carriers, upon election of the correspondent carriers.[161] C&W states that divestiture is necessary because, if AT&T and BT self-correspond on the U.S.-U.K. route, they can force their other correspondents to strand the half-circuits that currently are used to carry AT&T and BT traffic. In a subsequent *ex parte* filing, C&W modified its request, urging the Commission to require divestiture, "at market prices," "to the extent that actual stranding (or significant idling) of half-circuits occurs."[162]

70. We are not convinced that a condition mandating divestiture, either at cost or "reasonable rates," is necessary. AT&T has committed to "divest, at prevailing market rates and terms . . . [its] existing US-end half circuits with a competitor's UK-end half circuits that the global venture determines . . . are unlikely to be used to deliver significant volumes of traffic."[163] Moreover, C&W has not shown that AT&T and BT would be willing to incur the costs of stranding their own half of the circuits they maintain with other correspondents. As noted above, C&W may still compete to terminate AT&T traffic in the United Kingdom. There is thus no basis to conclude that C&W's half circuits with AT&T will be idle. Given these considerations, we decline to condition approval of the joint venture on divestiture by AT&T and BT of the half-circuits they maintain with other correspondent carriers. We do note, however, that Commission policy disfavors allowing capacity to remain idle.[164] Therefore, if C&W or any other

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159 *See supra* ¶ 64-66.

160 ISR allows carriers to route switched traffic over international private lines interconnected to the public switched network. Such traffic is not subject to the international accounting rate system. *See Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559, 561-62, ¶¶ 17-24 (1991).

161 C&W reply at 20-22.

162 *Ex parte* letter from Keith Bernard, C&W, to Magalie Roman Salas, Secretary, FCC, at 2 (May 20, 1999).

163 *See* AT&T/BT May 28, 1999 *ex parte* letter at 4.

164 *See e.g., Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in*

correspondent that maintains half-circuits with AT&T can demonstrate that AT&T has idled matched half-circuits on the U.S.-U.K. route, without a valid business reason, the Commission will entertain a petition to require the sale of those idled half-circuits at market rates.

C. Third Country Routes

71. C&W asserts that the proposed joint venture will enable AT&T and BT to raise rivals' costs on third country routes by routing foreign-originated minutes destined for a third country through AT&T in the United States. According to C&W, this strategy would earn AT&T return traffic at the expense of its competitors on the third country route. C&W alleges that, for example, BT could send to a third country only the volume of minutes that matches the volume that country sends to the U.K., leaving BT with no settlement outpayment. BT could then send any additional traffic to the third country through AT&T's network in the United States, thereby earning AT&T return traffic.

72. Consistent with the Commission's holding in the *BT/MCI Order,* we conclude that there is no reason to restrict the ability of AT&T and BT to reoriginate BT third country traffic via AT&T's U.S. network.[165] Least-cost routing mechanisms such as reorigination are an economically rational response to inflated settlement rates and, as such, the Commission has not found that they should be prohibited or limited generally. In fact, the Commission has encouraged the development of least-cost routing mechanisms as a way to put pressure on above-cost accounting rates.[166] Moreover, as the Commission noted in the *BT/MCI Order*, all carriers have an equal incentive and ability to reoriginate traffic through the United States in order to reduce settlement payments.[167]

D. Transit Market

73. We consider here the competitive effects of the proposed joint venture on the transit market.[168] In particular, we consider C&W's allegation that the joint venture will result in

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the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHZ and 24.75 25.25 GHz Frequency Bands for Broadcast Satellite, IB Docket No. 98-172, Report and Order, FCC 99-18 (rel. Feb. 10, 1999).

165 *See BT/MCI Order*, 12 FCC Rcd at 15,471, ¶ 312.

166 *See Policy Statement,* 11 FCC Rcd at 3147, ¶ 12. Least-cost routing allows carriers to circumvent the accounting rate system on routes where accounting rates are high.

167 *BT/MCI Order*, 12 FCC Rcd at 15,471, ¶ 312.

168 Transit allows a carrier in one country, the originating carrier, to route traffic to a carrier in another country, the destination carrier, through a carrier in a third country, the transit carrier. The originating carrier pays a transit fee

an increase in concentration on many of what C&W refers to as "thin routes," or routes on which BT and AT&T are the only carriers or on which they control more than 60 percent of traffic. C&W argues that this level of concentration will allow the joint venture to charge above-cost rates to carriers for transit services.[169] To remedy these alleged anticompetitive effects of the joint venture, C&W urges the Commission to require AT&T and BT to divest capacity on individual routes on which they are the only two, or two of the only three, facilities-based carriers. C&W also proposes that the joint venture's contracts to supply international carriage services to other carriers must not have a term of more than 12 months or include onerous termination notice requirements or penalties.[170]

74. We conclude that C&W has not provided sufficient evidence for the Commission to conclude that the joint venture will harm competition in the transit market. While C&W charges that the joint venture will control more than 60 percent of traffic on so-called thin routes, C&W provides no evidence concerning the identity of such routes or the market shares of rivals on those routes.[171] The Commission does not regulate the transit market and does not have information about foreign carriers' transit routes. Without this information, the Commission can make no determination as to the ability of the joint venture to exercise market power on a particular route. We therefore decline at this time to require the joint venture to divest capacity on certain transit routes or to impose any restrictions on the joint venture's offering of transit services.

75. It is the Commission's understanding that, as a general matter, the global transit market is highly competitive. As AT&T/BT note, there are thousands of routes to the 240 countries of the world.[172] In addition, it is the Commission's understanding that there is no dearth of capacity on most transit routes and that there are no barriers to entry for firms with excess capacity to provide transit services in competition with the joint venture.[173] The Commission is

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to the transit carrier for delivering the traffic to the destination carrier.

169 C&W opposition at 9-10.

170 C&W reply at 22-23.

171 We note that in the *AT&T International Non-Dominance Order,* the Commission found that AT&T is the exclusive provider from the U.S. to only four countries: Madagascar, Western Sahara, Chagos Archipelago (now known as Diego Garcia), and Wallis and Futuna. The Commission forbore from regulating AT&T as dominant on these routes because of the *de minimis* traffic volumes, stating that "regulation could impede rather than promote competition." *See AT&T International Non-Dominance Order,* 11 FCC Rcd at 17,998-99, ¶¶ 94, 97.

172 AT&T/BT reply at 44.

173 See AT&T/BT reply at 44 (international carrier can use spare capacity to supply transit services with little or no additional investment).

also aware, however, that there are concerns that transit rates are excessive on some routes.[174] There is no agreement, though, on the causes of high transit rates on certain routes. High rates could be caused by a number of factors, including inadequate competition, high underlying accounting rates, low traffic volumes, and inadequate information in the marketplace. Because we have no basis to conclude that the proposed joint venture would exacerbate the concern about high transit rates on some routes, we decline at this time to impose any restrictions on the joint venture. We will, however, continue to monitor the transit market to ensure that the joint venture, as well as other transit providers, are not acting in an anticompetitive manner.

E. Public Interest Benefits

76. We find that the proposed joint venture is likely to have several possible pro-competitive effects. First, the joint venture will give BT a strong U.S. partner to replace MCI as a provider of global seamless services to U.S.-based MNCs. As we noted, BT has been unable to generate significant revenues by selling Concert services in the United States after the break-up of its proposed merger with MCI in September 1998.[175] However, a combined AT&T/BT operation, such as the JV, is more likely to be able to offer U.S. customers increased choices and services by competing with the other alliances and carriers in this market. Second, AT&T, too, may become a more effective competitor in the global seamless services market by replacing its former loosely-formed global alliance with the proposed joint venture with BT. AT&T/BT, for instance, argue that AT&T's former global alliance was "less than maximally effective" in serving global MNCs because it did not offer them a single point of contact or comparable technologies and architectures worldwide.[176] The JV, by contrast, proposes to offer services tailored to the needs of global MNCs and to build an IP-based global network that uses open standards. Third, by building an IP-based global network that will offer high-speed transport capacity to the world's largest cities, the JV will further the development of packet-switched international networks and facilitate the migration from the circuit switched network. The result will be to benefit users of voice, data, and video services who demand increased bandwidth. Finally, the joint venture is likely to benefit consumers by encouraging the movement away from the traditional accounting rate regime and toward competitive alternatives, including end-to-end provisioning, for the termination of international traffic.

F. National Security Issues

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174 For example, the issue of transit rates has been discussed at the International Telecommunication Union (ITU). *See, e.g.*, Methodological Note on Transit Rates, contribution by the ITU Secretariat to the Telecommunications Standardization Sector Study Group 3 Focus Group on Accounting Rates (Aug. 12, 1998).

175 *Supra* ¶ 45.

176 AT&T/BT application at 13.

77. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding, which, pursuant to the public interest analysis articulated in the Commission's Foreign Participation Order[177] we must consider. In comments filed with the Commission, the Department of Defense (DOD) requests that the parties undertake negotiations to ensure that national security and law enforcement issues will be protected should the proposed JV take place.[178] Similarly, in its comments on the proposed JV, the Federal Bureau of Investigation (FBI), through the Department of Justice (DOJ), voices concern regarding national security, public safety, and law enforcement.[179]

78. DOD, DOJ, FBI, and AT&T/BT have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety issues raised in the DOD, DOJ, and FBI comments. The parties have submitted a copy of the executed agreement (DOD/DOJ/FBI Agreement) which conditions the grant of the application to obtain or transfer licenses and authorizations on compliance with the agreement. In brief, the DOD/DOJ/FBI Agreement provides that all domestic telecommunications infrastructure owned directly or indirectly by AT&T/BT will be owned and controlled by VLT and License Co. (collectively, the Company) and will at all times be located in the United States. Further, all telecommunications of United States JV subscribers carried over the Company's facilities shall pass through a facility, from which surveillance can be conducted, that is physically located in the United States and under the control of either the Company or a licensed United States carrier. The Company agrees to take reasonable and appropriate measures to prevent improper use of facilities used in the domestic telecommunications infrastructure, specifically with respect to personnel holding sensitive positions, information storage and access, and disclosure to foreign entities. The parties have also agreed to adopt and maintain certain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, orders, legal process, and statutory authorizations and certifications related to subscriber records and information. Finally, the parties have also agreed to implement certain measures requiring personnel security clearances, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices.

79. We note that the Agreement, the negotiation of which delayed significantly resolution of this proceeding, reflects a unique situation and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry.

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[177] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997).

[178] Comments of the Secretary of Defense, filed January 19, 1999, at 2-3.

[179] Comments of the Federal Bureau of Investigation, filed January 8, 1999, at 2.

These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part. Therefore, this agreement does not establish precedent for future cases. However, notwithstanding these concerns about the broader implications of some provisions of this Agreement, we see no reason to modify or disturb the Agreement of the parties on this matter.

80. In accordance with the request of the DOD/DOJ/FBI and the discussion above, we condition our grant of the application to obtain or transfer certain licenses and authorizations in connection with the proposed JV on compliance with the DOD/DOJ/FBI Agreement, a copy of which is attached hereto as Appendix B.

V. COMPETITIVE SAFEGUARDS

81 In this section, we review whether, as a result of the proposed transaction, our dominant carrier safeguards should apply to AT&T and the JV entities and whether there is a need for additional regulatory safeguards to prevent anticompetitive harms.

A. Dominant Carrier Status of AT&T and the JV Entities

82 Under Section 63.10 of our rules, we classify a U.S. carrier as dominant on a U.S. international services route if it is "affiliated" with a foreign carrier that has sufficient market power on the foreign end to affect competition adversely in the U.S. market.[180] The rule further states that, if the U.S. carrier demonstrates that its foreign affiliate possesses less than 50 percent market share in the international transport and local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant.[181] In addition, in the *Foreign Carrier Entry Order*, the Commission stated that dominant carrier regulation may be warranted if a non-equity alliance such as the proposed joint venture posed a "substantial risk of anticompetitive effects" on a particular route.[182]

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[180] The regulatory safeguards imposed on carriers that are classified as dominant on particular routes due to an affiliation or alliance with a foreign carrier with market power are set forth in Section 63.10(c) and differ from the regulatory safeguards imposed on carriers that are dominant for reasons other than a foreign carrier affiliation. Section 63.10(c) requires quarterly reporting of traffic and revenue, provisioning and maintenance, and circuit status; it also imposes limited structural separation, which includes separate corporate affiliates, separate books of account, and no joint ownership of transmission or switching facilities. 47 C.F.R. § 63.10(c).

[181] 47 C.F.R. § 63.10(a)(3). *See Foreign Participation Order*, 12 FCC Rcd at 23,869-99, ¶¶ 177-239.

[182] *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873, 3924-26, ¶ 253 (*Foreign Carrier Entry Order*). *See also Foreign Participation Order,* 12 FCC Rcd at 23992, ¶ 224.

83. We clarified the definition of "affiliation" in our recent biennial review of international common carrier regulations.[183] As currently defined, a U.S. carrier is affiliated with a foreign carrier if: (1) the U.S. carrier owns more than 25 percent of, or controls, the foreign carrier; (2) the foreign carrier owns more than 25 percent of, or controls, the U.S. carrier; or (3) the foreign carrier has entered into an alliance or joint venture with a second foreign carrier to provide telecommunications services and the two foreign carriers together own more than 25 percent of, or control, the U.S. carrier.[184]

84. *VLT and TLTD.* In this case, we find that the JV entities VLT and TLT[185] are U.S. carriers affiliated with BT within the meaning of our rules because BT owns more than 25 percent of both VLT and TLTD. We also find that, because AT&T/BT did not attempt to demonstrate that BT has less than 50 percent of the U.K. local exchange market, under our rules we presume that BT has market power in the U.K.[186] Thus, we conclude that VLT and TLTD will be regulated as dominant carriers on the U.S.-U.K. route under Section 63.10 of our rules.

85 We note that, as dominant carriers, VLT and TLTD will be required to file quarterly reports on traffic and revenues, provisioning and maintenance of basic services and facilities procured from BT, and circuit status on the U.S.-U.K. route. In addition, VLT and TLTD must maintain limited structural separation from BT, including a prohibition on jointly owning transmission or switching facilities.[187] AT&T/BT state that VLT and TLTD will report, on a quarterly basis, provisioning and maintenance of basic services and facilities procured from

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[183] 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements, FCC 99-51, Order, at ¶¶ 77-78 (rel. Mar. 23, 1999) (*1999 Streamlining Order*).

[184] *See* Section 63.09(e), 47 C.F.R. § 63.09(e), which provides that:

> Two entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one. Also, a U.S. carrier is *affiliated* with two or more foreign carriers if the foreign carriers, or entities that control them, together directly or indirectly own more than 25 percent of the capital stock of, or control, the U.S. carrier and those foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of international basic telecommunications services in the United States.

[185] VLT and TLTD are JV entities that have applied for Section 214 authorizations to provide international services. *See supra* ¶¶ 5-6.

[186] *See* 47 C.F.R. § 63.10(c)(3). *See also* AT&T/BT reply at 54 ("since Applicants have not attempted to demonstrate in this proceeding that BT lacks market power in the UK, the regulated entities ... initially will be subject to 'dominant carrier' regulation on the US-UK route"). *See also* Level 3 comments at 11; MCI WorldCom comments at 13.

[187] *Supra* n.177.

BT directly or indirectly.[188] Consistent with our rules, VLT and TLTD must file quarterly reports on provisioning and maintenance procured from BT directly or indirectly, including through Concert. We make AT&T/BTs' compliance with our rules a condition of this order.

86 Although we conclude that VLT and TLTD are dominant because they are affiliated with BT, we also find that neither VLT, TLTD nor Concert, the JV's U.K.-licensed affiliate, has market power with regard to any of the input markets in which they own or control assets, *i.e.*, the markets for international transport and U.K. cable landing stations.[189] As noted above, no carrier has market power in the U.S.-U.K. transport capacity market.[190] In addition, a number of international facilities operators, in addition to Concert, provide access to cable landing stations in the United Kingdom. For instance, C&W operates the cable landing stations for Gemini, and Global Crossing operates the cable landing station for AC-1.[191] In 1999, 30 percent of U.S.-U.K. self-healing submarine cable capacity will land at BT cable landing stations and 70 percent at cable landing stations operated by C&W and Global Crossing.[192] Also, as we have previously noted, there are no significant barriers to entry by new firms in this market.[193]

87 C&W asserts that our dominant carrier requirements "will not adequately constrain the ability of the JV to misuse its market power" and urges us to impose a set of "more stringent reporting requirements" on the JV entities than for other carriers affiliated with foreign carriers with market power.[194] However, as discussed above, we find that the JV entities do not

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188 AT&T/BT June 28, 1999 *ex parte* letter at 2.

189 As noted above, VLT owns the cable landing stations and international cable facilities within the U.S. territorial limits and TLTD owns the international cable facilities outside the U.S. and U.K. territorial limits. *Supra* ¶¶ 5-6. In addition, Concert, a U.K.-licensed affiliate of the JV, owns the JV's international cable facilities and cable landing stations within the U.K. territorial limits. *Supra* n.5.

190 *See supra* ¶ 48.

191 *See* Affidavit of Philip C. Stubbington (Stubbington affidavit) at Table A, attached to *ex parte* letter from Joel Winnick, counsel for BT, to Magalie Roman Salas, Secretary, FCC (Mar. 19, 1999).

192 Stubbington affidavit at table C, modified by excluding capacity for all cables that are not self-healing.

193 *See BT/MCI Order*, 12 FCC Rcd at 15,415-16, at ¶¶ 166-68.

194 C&W reply at 10, 24. The more stringent requirements proposed by C&W are: (1) keep records of all services and facilities provided by BT or AT&T to the JV or by the JV to BT or AT&T; (2) file monthly status reports for circuits between the United States and United Kingdom and publish those reports quarterly; (3) file notifications of all circuits added between the United States and United Kingdom, including the ownership of those circuits; (4) file quarterly reports of revenue, quantity of messages and minutes of telecommunications traffic originating and terminating on the U.S.-U.K. route within 90 days of the end of each quarter; and (5) identify, in quarterly reports to the Commission, the volume of traffic that is reoriginated traffic through the United States, and the volumes of third country traffic reoriginated through the United States to the United Kingdom and Europe. C&W reply at 24-25.

have market power on the U.S.-U.K. route.[195] Thus, we conclude that the additional reporting requirements C&W urges us to adopt are not necessary to prevent VLT and TLTD from acting anticompetitively.[196]

88. We are not persuaded by C&W's claim that the JV would be able to identify potential customers, and thereby gain an anticompetitive advantage over its U.S. competitors, by using customer and carrier information that BT derives from its local exchange operations in the United Kingdom.[197] Section 63.21(e) of our rules prohibits U.S. carriers from accessing or using specific U.S. customer proprietary network information that is derived from a foreign network, unless the carrier obtains approval from the U.S. customer.[198] Section 63.21(f) prohibits U.S. carriers from receiving from a foreign carrier any proprietary or confidential information pertaining to a competing U.S. carrier, unless the competing U.S. carrier provides written permission.[199] Thus, our rules prohibit AT&T, VLT, and TLTD, all of which are licensed U.S. carriers, from accepting or using any confidential U.S. customer or carrier information without prior approval from the customer or carrier. We also note that, in the *BT/MCI Order,* the Commission concluded that Conditions 38 and 38A of BT's license prohibit BT from using confidential customer information to gain an unfair competitive advantage, and Condition 41A of BT's license prohibits the disclosure of confidential carrier information.[200] C&W states that Oftel has not included similar conditions in the JV's proposed U.K. license and, therefore, urges us to prohibit AT&T/BT from using confidential customer and carrier proprietary information that they obtain from BT.[201] We find, however, that such conditions are not necessary because Oftel's proposed licenses for BT includes prohibitions against the unauthorized disclosure of

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195 *Supra* ¶ 83.

196 However, we note that Section 63.10(c) requires U.S. international carriers classified as dominant to comply with some of the requirements suggested by C&W. For instance, Section 63.10(c) requires VLT and TLTD to: (1) file quarterly reports of provisioning and maintenance of basic facilities and services procured by the JV entities from BT; (2) file quarterly notifications of all circuits added between the United States and United Kingdom and whether the circuits are active or idle; and (3) file quarterly reports of revenue, quantity of messages and minutes of telecommunications traffic originating and terminating on the U.S.-U.K. route within 90 days of the end of each quarter.

197 *See* C&W reply at 17.

198 47 C.F.R. § 63.21(e).

199 47 C.F.R. § 63.21(f).

200 *BT/MCI Order,* 12 FCC Rcd at 15,443-45, ¶¶ 235-38.

201 *Ex parte* letter from Keith Bernard, C&W, to Sherille Ismail, International Bureau, FCC, at 2 (June 16, 1999).

confidential customer and carrier information.[202] Thus, we reiterate the finding in the *BT/MCI Order* that U.K. regulations protect U.K. customer and carrier proprietary information against unauthorized disclosure.[203] Therefore, we conclude that it is not necessary to adopt a condition prohibiting AT&T, VLT, and TLTD from using in their own marketing efforts customer information that BT derives from its customers or other carriers as a result of providing interconnection in the United Kingdom.

89 *AT&T.* We also examine whether AT&T should be classified as a dominant carrier on the U.S.-U.K. route under Section 63.10 of our rules. Concert, the JV's U.K.-licensed affiliate, is a foreign carrier on the U.S.-U.K. route and, because AT&T holds more than 25 percent of its ownership shares, we find that Concert is affiliated with AT&T under our rules.[204] For the reasons stated above, however, we conclude that Concert does not have market power in any of the input markets in which it owns or control assets, *i.e.*, the markets for international transport and U.K. cable landing stations.[205] We also address whether Concert, because of its affiliation with BT, may derive market power as a result of BT's market power over U.K. local access and termination. We conclude that, while BT has market power that could enable it to favor the JV, our competitive safeguards prevent the U.S.-licensed JV entities from accepting any preferential treatment from BT.[206] However, to ensure that there is no loophole that would permit the JV to accept a special concession from BT through Concert, we adopt as a condition

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202 BT's proposed license includes a specific prohibition, similar to Conditions 38 and 38A in BT's current license, against the unauthorized disclosure of confidential customer information. *See ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC at 1 (June 11, 1999). In addition, Oftel's proposed licenses for BT includes a condition stating that:

> Any information received by Licensee from any person for the purposes of any provision in Part C [i.e., concerning interconnection] shall be used only for the purpose for which it was supplied. The Licensee shall not pass such information on to other departments within the Licensee's organization, subsidiaries, or partners for which such information could provide a competitive advantage.

AT&T/BT June 28, 1999 *ex parte* letter at 1. Moreover, BT's published interconnection agreements include prohibitions against disclosing confidential carrier information, and Oftel requires BT to offer these same terms in all future interconnection agreements. *Id* at 2.

203 *BT/MCI Order*, 12 FCC Rcd at 15,444-45, ¶ 238. *See Foreign Participation Order*, 12 FCC Rcd at 23,968, ¶ 175 (recognizing that *foreign customer* information derived from a foreign network is within the jurisdiction of foreign administrations).

204 AT&T/BT June 28, 1999 *ex parte* letter at 2.

205 *See supra* ¶ 83.

206 Furthermore, we note that Oftel prohibits BT from offering any favorable rates to AT&T, or to any of the JV entities, that it does not offer to all U.K. carriers. *BT/MCI Order,* 12 FCC Rcd at 15,439-40, ¶ 224.

of this order AT&T/BTs' compliance with Section 63.14 of our rules.[207] Accordingly, we conclude that Concert does not have market power on the U.S.-U.K. route, and, therefore, AT&T should not be regulated as dominant on the U.S.-U.K. route by virtue of its affiliation with Concert. In addition, we conclude that AT&T is not affiliated with BT because: (1) AT&T does not own more than 25 percent of, or control, BT; (2) BT does not own more than 25 percent of, or control, AT&T; and (3) BT and Concert together do not own more than 25 percent of, or control, AT&T. Thus, we do not agree with MCI WorldCom's argument that AT&T should be regulated as dominant on the U.S.-U.K. route because it is affiliated with a foreign carrier with market power in the United Kingdom.[208]

90. We are also not persuaded by MCI WorldCom's argument that, even if we find that AT&T is not affiliated with BT, we should regulate AT&T as dominant on the U.S.-U.K route because "the interests of AT&T and BT are so intertwined.[209] As the Commission stated in the *Foreign Carrier Entry Order*, dominant carrier regulation may be warranted if a non-equity alliance such as the proposed joint venture posed a "substantial risk of anticompetitive effects" on a particular route.[210] We find there is no such risk in this case. Under the terms of their agreement to form a joint venture, AT&T will not buy any services directly from BT, but will buy services from the JV. Under the "no special concessions rule," as described below, neither VLT nor TLTD can accept any exclusive arrangements from BT. Further, because VLT and TLTD are regulated as dominant, we will be able to monitor their dealings with BT to ensure that they do not receive any anticompetitive benefits from BT that they in turn could pass on to

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[207] AT&T, VLT and TLTD, either directly or indirectly through the joint venture's U.K. subsidiary, Concert, will not accept any special concession from BT that would violate Section 63.14. *See ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC (May 28, 1999) (AT&T/BT May 28, 1999 *ex parte* letter).

[208] *See* MCI WorldCom comments at 5-6. MCI WorldCom's argument relies on language in a definition that is no longer in effect. The relevant language in that section provided that: "A U.S. carrier also will be considered to be affiliated with a foreign carrier where the foreign carrier *controls*, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier." 47 C.F.R. § 63.18(h)(1)(i)(B). MCI WorldCom argues that AT&T is affiliated with BT because (1) BT is a "foreign carrier;" (2) BT "controls ... a second foreign carrier [the JV's U.K. subsidiary]"; and (3) the "second foreign carrier" has already been found to be affiliated with AT&T. In the *1999 Streamlining Order*, we eliminated the definition of affiliation in Section 63.18(h)(1)(i)(B) because it did not comport with our intent in adopting the definition of affiliation in the *Foreign Carrier Entry Order*. *1999 Streamlining Order*, FCC 99-51, at ¶¶ 77-78.

[209] MCI WorldCom comments at 6, n.14.

[210] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3926, ¶ 253 (noting that the "substantial risk" standard is an exception to the general rule that, even if a foreign carrier has the ability to discriminate in favor of its joint venture partner, it usually does not have the incentive to do so because any preferential treatment for its non-equity partner would come at its expense).

AT&T. Thus, BT, either directly with AT&T or through the JV, will not have the opportunity to engage in anticompetitive conduct by discriminating in favor of AT&T.[211] Thus, we conclude that the JV does not pose a substantial risk of anticompetitive harm on the U.S.-U.K. route and dominant carrier regulation for AT&T is not warranted.

91. Finally, we disagree with Star that the JV will violate the Commission's rules against joint ownership of facilities by a U.S. carrier and its foreign carrier affiliate in circumstances where the U.S. carrier is regulated as dominant on the affiliated route.[212] As we have found, AT&T is not affiliated with BT or otherwise subject to dominant carrier regulation by virtue of its joint venture with BT. Thus, AT&T is not prohibited from jointly owning facilities with BT through the JV.[213] In addition, we find that VLT or TLTD, because they do not jointly own any facilities with BT, will not violate the rule. Indeed, BT, by transferring its ownership in facilities to a separate subsidiary, *i.e.*, the JV, is complying with our structural separation requirement.[214] Thus, we conclude that the JV will not violate the Commission's rules against joint ownership of facilities by a U.S. carrier and its foreign carrier affiliate deemed to have market power.

B. No Special Concessions Rule

92. In the *Foreign Participation Order*, the Commission adopted certain safeguards to prevent foreign carriers from leveraging their foreign market power into the U.S. international services market. One of these safeguards, the no special concessions rule[215] prohibits U.S.

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[211] AT&T is required by the Framework Agreement to purchase its international services from the JV, which will be regulated as a dominant carrier. In the event that AT&T at some future date acquires services directly from BT, we reserve the right to regulate AT&T as dominant if we conclude that BT has the ability to discriminate in favor of AT&T and against its U.S. rivals on the U.S.-U.K. route.

[212] Star comments at 2.

[213] *See* 47 C.F.R. § 63.10(c)(2)(ii).

[214] *See id*.

[215] The no special concessions rule appears in Section 63.14 of the Commission's rules. Section 63.14(a) prohibits any U.S. international carrier from:

> agreeing to accept any special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market ....

47 C.F.R. § 63.14(b) of the Commission's rules defines a "special concession" as:

carriers from agreeing to accept a special concession from any foreign carrier with market power on the foreign end of a U.S. international route. Such arrangements, we noted, "could limit rival U.S. carriers' ability to provide international services, raise these carriers' costs of termination, or degrade the quality of their service offerings, to the ultimate harm of U.S. consumers.[216] We also noted, however, that "it is unlikely that an exclusive deal involving a foreign carrier that lacks market power would result in harm to competition and consumers in the U.S. market.[217] In addition, in connection with the *ISP Reform Order,* the Commission issued a *Public Notice* containing a list of foreign carriers that are presumed to have market power for purposes of applying the Commission's No Special Concessions rule.[218] The Commission stated that a carrier will be presumed to have market power if it controls, is controlled by, or is under common control with a carrier identified in the *Notice*.[219]

93. In this case, we conclude that, because BT is a "foreign carrier" that has market power, the no special concessions rule prohibits AT&T, VLT, and TLTD from accepting any exclusive arrangements, as defined in Section 63.14(b), from BT.[220] We agree with commenters

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an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed carriers, and involves: (1) operating agreements for the provision of basic services; (2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.

47 C.F.R. § 63.14(b). In the *ISP Reform Order*, we amended Section 63.14 to clarify that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including the allocation of return traffic, on routes where we remove the ISP. *ISP Reform Order,* FCC 99-73 at ¶ 85. However, we also concluded that the No Special Concessions rule should continue to apply to certain arrangements with foreign carriers that possess market power, even where we no longer apply the ISP. *Id.* at ¶ 86 (agreeing that the No Special Concessions rule prohibits discrimination with respect to "interconnection terms, private line provisioning, quality of service and the like").

216 *Foreign Participation Order*, 12 FCC Rcd at 23,958, ¶ 157.

217 *Id*.

218 International Bureau, *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, *Public Notice,* DA 99-809 (May 6, 1999) (*List of Dominant Carriers)*. *See ISP Reform Order*, FCC 99-73, at ¶ 43.

219 List of Dominant Carriers, DA 99-809, at 4.

220 We note that AT&T/BT agree with this conclusion. *See* AT&T/BT reply at 45-47.

that an exclusive arrangement between AT&T and BT, or between VLT or TLTD and BT, could raise competing carriers' termination costs in the United Kingdom and impair their ability to compete on the U.S.-U.K. route.[221] MCI WorldCom urges us to adopt a specific condition prohibiting AT&T and the JV from accepting preferential arrangements from BT with respect to Home Country Direct, 1-800, and ISDN.[222] We conclude that our no special concessions rule prohibits AT&T, VLT, and TLTD from accepting any exclusive arrangements from BT with respect to these and any other basic services and, therefore, we find that specific conditions are not necessary. AT&T/BT state that AT&T, VLT, and TLTD, either directly or indirectly through the joint venture's U.K. subsidiary, Concert, will not accept any special concession from BT that would violate Section 63.14.[223] Consistent with our rules, AT&T, VLT, and TLTD, either directly or indirectly through the joint venture's U.K. subsidiary, Concert, cannot accept any special concession from BT. We make AT&T/BTs' compliance with our rules a condition of this order.

94. In addition, we agree with Equant that the no special concessions rule also prohibits AT&T and VLT and TLTD from accepting any special concessions from other dominant foreign carriers, in addition to BT.[224] Equant identifies several exclusive arrangements between BT and the JV entities that it urges us to specify are prohibited by the no special concessions rule.[225] We conclude that our no special concessions rule prohibits VLT and TLTD from accepting exclusive operating agreements for provision of basic services from any foreign carrier with market power as well as other exclusive arrangements of the nature described by Equant, with two exceptions: as the Commission stated in the *Foreign Participation Order*, the no special concessions rule by its terms does not prohibit exclusive marketing or transiting arrangements.[226] The Commission previously has declined to apply the rule to marketing

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221 *See* MCI WorldCom comments at 10, Level 3 comments at 12, Equant reply at 6-12.

222 MCI WorldCom comments at 9-10.

223 AT&T/BT May 28, 1999 *ex parte* letter at 1.

224 Equant reply at 11-12.

225 Equant urges us to adopt conditions to prohibit: (1) any exclusive marketing or operating arrangements with dominant foreign carriers; (2) any exclusive arrangement that would prevent a foreign carrier from providing sufficient transmission capacity or distribution services to meet the needs of competing providers of global seamless services; (3) distribution or interconnection agreements that are not made available to other providers of global seamless services; (4) the use of any information not publicly available about the operation of any foreign carrier's network services that would affect the provision of global seamless services; (5) preferential pricing or treatment in the provisioning and maintenance of facilities and services used in providing global seamless services; and (6) exclusive transiting arrangements not made available to other providers. Equant reply at 12.

226 *Foreign Participation Order*, 12 FCC Rcd at 24,021-22, ¶ 291.

arrangements because to do so "would be unduly burdensome and could impede unnecessarily the provision of one-stop shopping by injecting uncertainty with respect to the scope of permissible joint activities.[227] For the reasons stated above,[228] we decline to extend the rule to prohibit exclusive transiting arrangements as well.

95. We note that, under the *Public Notice* released in connection with the *ISP Reform Order,* the JV entities (VLT, TLTD, and Concert) are presumed to have market power for purposes of the no special concessions rule because they are controlled by BT, a dominant carrier. We find, however, that AT&T/BT are able to overcome the presumption that the JV entities have market power for purposes of applying the no special concessions rule. As discussed above, VLT, TLTD, and Concert do not have market power in any of the input markets in which they own or control assets, i.e., international transport and U.K. cable landing stations.[229] Moreover, under the no special concessions rule, VLT and TLTD, either directly or indirectly through the joint venture's U.K. subsidiary, Concert, cannot accept any exclusive arrangements from BT. Thus, the JV will be unable to gain any exclusive arrangement from BT that it can convey to AT&T without also offering the same arrangement to AT&T's U.S. competitors. Accordingly, we conclude that the no special concessions rule does not prohibit AT&T from accepting provisioning of international network facilities and services from VLT and TLTD at preferential rates, i.e., at or below cost, rather than at tariffed rates.

C. Equal Access in the United Kingdom

96. Equal access refers to a policy of requiring an exchange carrier (such as BT) to offer its competitors access to its local exchange customers to provide interexchange and international calls on the same basis as the exchange carrier affords to itself.[230] We find that the United Kingdom does not at present offer equal access[231] either through "dialing parity" or "carrier pre-selection.[232] Instead, U.K. customers who wish to switch to competing providers

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227 *Id*.

228 *See supra* ¶ 74-75.

229 AT&T/BT reply at 47-52.

230 *See BT/MCI Order*, 12 FCC Rcd at 15,421, ¶ 183, n.253.

231 *See* Level 3 comments at 8, Sprint comments at 7-9.

232 "Dialing parity" exists when a caller must dial the same number of digits to make an intercity or international call regardless of which operator the caller has chosen to carry the call. *See BT/MCI*, 12 FCC Rcd at 15,421, ¶ 183, n.254. "Carrier pre-selection" allows a customer to choose, on a permanent basis, a provider to carry all of the customer's long-distance or international calls. *See BT/MCI Order*, 12 FCC Rcd at 15,421, ¶ 183, n.255.

must now dial extra digits, use automatic dial-around equipment, or specially program PBXs.[233] We find that these extra measures are likely to raise the costs of the JV's competitors[234] thereby potentially resulting in higher prices for global seamless services. We also note that the EC's "Carrier Pre-Selection" directive, which became effective in September 1998, requires the United Kingdom to adopt carrier pre-selection by January 1, 2000.[235]

97. We are not persuaded by AT&T/BTs' argument that the U.K.'s lack of equal access is irrelevant to this proceeding because "BT's local offerings will not be a component of the [Joint] Venture.[236] The issue is not whether BT can restrict its competitors' ability to provide local exchange services but whether BT, as a result of forming a joint venture with AT&T to provide international services, has the ability and incentive to discriminate against the JV's competitors in the market to provide global seamless services.[237] We find that BT can engage in a form of non-price discrimination by denying equal access to its competitors, and that BT has a greater incentive to engage in that form of discrimination as a result of forming the joint venture with AT&T to provide international services.[238] Thus, we conclude that implementation of equal access in the United Kingdom is necessary to restrict BT's ability to leverage its market power over U.K. local access and impede competition in the global seamless services market.

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233 Esprit comments at 2, Level 3 comments at 8-10.

234 *See e.g.*, Esprit comments at 2 (cost of dial automatic dialing equipment is $30 per line).

235 *See* AT&T reply at 57. Oftel, however, has petitioned the EC to delay implementation of carrier pre-selection for national and international calls to December 31, 2000, and for local calls to December 31, 2001. *See* < http://www.oftel.gov.uk/competition/cps 1198.htm >.

236 *See* AT&T/BT reply at 55-56. AT&T appeared to acknowledge the issue, however, in the *BT/MCI Order*, where it stated that:

> "without equal access, BT will continue to control the dominant share of the U.S.-U.K outbound traffic. *This outcome, however is not, as BT suggests, a matter simply for U.K. resolution.* The lack of equal access in the U.K. has a direct consequence for competitors of BT/MCI in the U.S. and the prices U.S. customers will pay to U.S. carriers for U.S.-U.K. calls." [italics added.]
>
> AT&T/BT reply comments filed March 17, 1997 in *BT/MCI*, *quoted in* Sprint comments at 8.

237 *See BT/MCI Order*, 12 FCC Rcd at 15,424, ¶ 189 ("the proposed merger will increase the incentive for BT to leverage its market power over U.K. local access to adversely affect competition in the global seamless services market.").

238 *See BT/MCI Order*, 12 FCC Rcd at 15,423, ¶ 187 (equal access is "a form of non-price discrimination which allows [BT] to leverage its control over the local exchange to enhance its control over the U.K. long distance and international markets").

98. We, therefore, require as a condition of approval of this joint venture that VLT and TLTD not accept BT traffic originated in the United Kingdom to the extent that BT does not comply with Oftel regulations implementing the EC's carrier pre-selection directive.[239] Level 3 and Sprint urge us to require BT to provide equal access in the U.K.[240] and Esprit proposes several interim options[241] as conditions of approving the JV. We decline to impose these proposed conditions because, consistent with our findings in *BT/MCI*,[242] we conclude that Oftel and the EC will fully enforce the equal access requirement in the United Kingdom.

D. Unbundling the Local Loop in the United Kingdom

99. BT controls nearly 90 percent of local loops in the United Kingdom and is not required by U.K. regulations to make the "last mile" available to competitors on an unbundled basis.[243] We find, as we did in *BT/MCI,* that requiring BT to unbundle the local loop would foster local competition and, therefore, limit BT's ability to leverage control of its local access bottleneck to discriminate against its competitors in the global seamless services market.[244] We are also concerned that, unless Oftel requires BT to unbundle the local loop, Oftel may not be able to prevent some potential discrimination against the JV's competitors in providing end-to-end broadband services. For instance, it is not clear that Oftel's non-discrimination policy is sufficient to prevent BT from manipulating the deployment of particular technologies (e.g., xDSL) that are tailored to the demands of the JV's customers or only in locations that will primarily benefit the JV.[245] We note that Oftel has an ongoing proceeding to determine if new regulations, including unbundling of local loops, are needed to promote delivery of broadband services in the U.K.[246] Thus, while we reaffirm that the lack of unbundling in the U.K. local

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239 We imposed a similar requirement on MCI as a condition of approving its merger with BT. *See BT/MCI Order*, 12 FCC Rcd at 15,464-15465, ¶¶ 293-94.

240 Level 3 comments at 10, Sprint comments at 10.

241 Esprit comments at 3. Esprit proposes the following conditions: (a) making carrier pre-selection available to only major cities, or a minimum number of UK households, by January 1, 2000; (b) providing other service providers with a "rebranding" service priced on the basis of LRIC rather than the current retail-minus terms; and (c) paying rival service providers' cost of installing the automatic dialing equipment required to enable customers to circumvent the need to dial four extra digits. *Id.*

242 *See BT/MCI Order*, 12 FCC Rcd at 15,465, ¶ 294 (noting the U.K. Government's proven record of implementing EC telecommunications directives promptly and completely).

243 MCI WorldCom comments at 7-8.

244 *See BT/MCI Order*, 12 FCC Rcd at 15,426-15428, ¶¶ 192, 195-98.

245 MCI WorldCom comments at 14-15.

246 Oftel, *Access to Bandwidth: Bringing Higher Bandwidth Services to the Consumer,* (December 1998),

access market is relevant to determining if BT has the ability to impede competition in the global seamless services market, we do not agree with MCI WorldCom and Level 3 that we should require BT to unbundle the local loop in the United Kingdom as a condition of approving the proposed joint venture.[247]

VI. MISCELLANEOUS ISSUES

A. U.S. Submarine Cable Landing Stations

100. We are not persuaded by Sprint's argument that AT&T has leveraged its bottleneck control over cable landing stations in the United States to raise the costs of rival U.S. international carriers.[248] Although AT&T owns a majority of the U.S. cable landing stations.[249] AT&T does not have market power in this market. In fact, MCI WorldCom owns the cable landing stations at Manasquan, NJ, and Charleston, RI, and Global Crossing owns the cable landing station at Brookhaven, NY, and these cable landing stations land as much as 70 percent of self-healing transatlantic cable capacity.[250] By contrast, AT&T's cable landing stations at Green Hill, RI, and Shirley, NY, carry approximately 30 percent of self-healing transatlantic cable capacity.[251] Because we find that, contrary to Sprint's allegations, AT&T does not have bottleneck control over cable landing stations, we do not further address the merits of Sprint's allegations that AT&T abused its position as a cable station owner to benefit itself at the expense of other consortia co-owners.[252] We, thus, will not require, as Sprint urges, that the JV disclose

available at < http://www.oftel.gov/uk/competition/llul298.htm >.

247 MCI WorldCom comments at 15, Level 3 comments at 7-8.

248 Sprint comments at 10-20.

249 AT&T owns seven of eleven cable landing stations carrying transatlantic traffic and three of four cable landing stations carrying Caribbean traffic. Sprint comments at 12-13. *See* Affidavit of Thomas K. McInerney (McInerney affidavit), attached to AT&T reply comments, at 1-2. AT&T does not own any cable landing stations for Pacific Ocean cables.

250 We focus on self-healing transport capacity because, as the Commission noted in the *MCI WorldCom Order*, self-healing cables are the most cost-effective and reliable means of transporting calls. *MCI WorldCom Order*, 13 FCC 2d at 18076, ¶ 90. *See also BT/MCI Order*, 12 FCC Rcd at 15390, 15402, ¶¶ 98, 134-135 (examining TAT 12/13 for purposes of determining market concentration). We note that there are three transatlantic cables with self-healing capacity: TAT 12/13, which has 12,096 circuits; Gemini, which has 12,096 circuits; and AC-1, which has 16,128 circuits. *See MCI WorldCom Order*, 13 FCC 2d at 18076-82, ¶¶ 89, 92, 103.

251 *See* McInerney affidavit at 1-2.

252 *See* Sprint comments at 10-20 (charging that AT&T has sold cable station assets without seeking the consent or compensating other cable consortia owners or that AT&T delayed providing a digital access cross-connect system (DACS) on a nondiscriminatory basis to Sprint and other U.S. carriers).

to all cable consortia owners any and all documents concerning the JV's use of consortia assets in each of the JV's cable stations.[253] We conclude that any dispute between Sprint and other co-owners of consortia cables is a contractual dispute to be resolved in accordance with procedures established in the consortia cables' Construction and Maintenance Agreement.

B. Withdrawal of AT&T from its Global Alliances

101. AT&T states that on June 7, 1999, it agreed to withdraw from its global alliances immediately, subject to approval of the European Commission.[254] Thus, we take no further action in response to the commenters suggestion that we require AT&T to withdraw from its global alliances.[255]

VII. CONCLUSION

102. For the reasons discussed above, we grant AT&T/BTs' requests for the grant of Section 214 authority to VLT and TLTD to provide facilities-based and resold international common carrier services; (b) the assignment to VLT of submarine cable licenses held by AT&T or its subsidiaries; (c) the assignment to License Co. of certain earth station licenses held by AT&T or its subsidiaries, and (d) the modification of certain Section 214 authorizations held by AT&T or its subsidiaries.

VIII. ORDERING CLAUSES

103. Accordingly, IT IS ORDERED that, subject to the conditions below, the application for grant of Section 214 authority to VLT and TLTD to provide facilities-based and resold international common carrier services IS GRANTED;

104. IT IS FURTHER ORDERED that application for the assignment to VLT of submarine cable licenses held by AT&T or its subsidiaries IS GRANTED;

105. IT IS FURTHER ORDERED that the application for assignment to License Co. of certain earth station licenses held by AT&T or its subsidiaries IS GRANTED;

106. IT IS FURTHER ORDERED that the applications to modify certain Section 214

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253 *See id*.

254 AT&T/BT June 11, 1999 *ex parte* letter.

255 *See* C&W opposition at 13, MCI comments at 11.

authorizations held by AT&T or its subsidiaries to the extent necessary to assign to VLT ownership interests of AT&T in international cable facilities within United States territorial limits and to assign to TLTD the ownership interests of AT&T in international cable facilities outside of the U.S. territorial limit IS GRANTED;

107. IT IS FURTHER ORDERED that VLT and TLTD shall be regulated as dominant carriers, pursuant to Section 214 of the Act, 47 U.S.C. § 214, and Section 63.10 of the Commission's Rules, 47 C.F.R. § 63.10, on the U.S.-U.K. route; and that VLT and TLTD will report, on a quarterly basis, provisioning and maintenance of basic services and facilities procured from BT directly or indirectly, including through the JV's U.K. subsidiary, Concert.

108. IT IS FURTHER ORDERED that AT&T, VLT and TLTD, either directly or indirectly, including through the JV's U.K. subsidiary, Concert, will not accept any special concession from BT that would violate Section 63.14;

109. IT IS FURTHER ORDERED that grant of Section 214 authority to VLT and TLTD is conditioned upon VLT's and TLTD's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Commission's equal access requirements;

110. IT IS FURTHER ORDERED, that the authorization and licenses granted herein are subject to compliance with the provisions of the Agreement attached hereto between AT&T Corp., British Telecommunications PLC, TNV (NETHERLANDS) BV, VLT CO. LLC, and Violet License Co. LLC on the one hand and the Department of Defense (the DOD), Department of Justice (the DOJ) and the Federal Bureau of Investigation (the FBI) on the other, dated October 7, 1999, which Agreement is designed to address national security, law enforcement, and public safety concerns of the DOD, DOJ and the FBI regarding the licenses granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.

111. IT IS FURTHER ORDERED this Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

The following parties filed comments:

Federal Bureau of Investigation
Department of Defense
MCI WorldCom
Sprint
GTE
Star
Esprit
AT&T
Level 3
Cable and Wireless
Equant

APPENDIX B

This AGREEMENT is made this 7th day of October, 1999, by and between: AT&T CORP., BRITISH TELECOMMUNICATIONS PLC, TNV (NETHERLANDS) BV, VLT CO. LLC, VIOLET LICENSE CO. LLC, THE UNITED STATES DEPARTMENT OF DEFENSE (the "DoD"), the UNITED STATES DEPARTMENT OF JUSTICE (the "DoJ") and the FEDERAL BUREAU OF INVESTIGATION (the "FBI") (collectively "the Parties").

RECITALS

WHEREAS, the U.S. telecommunications system is essential to U.S. national security, law enforcement, and public safety;

WHEREAS, the U.S. Government considers it critical to maintain the viability, integrity, and security of that system (see e.g., Presidential Decision Directive 63 on Critical Infrastructure Protection);

WHEREAS, protection of Classified, Controlled Unclassified, and Sensitive Information is critical to U.S. national security;

WHEREAS, AT&T Corp. ("AT&T") operates a major U.S. telecommunications network under licenses granted to it and its subsidiaries by the Federal Communications Commission
("FCC");

WHEREAS, British Telecommunications plc ("BT"), a major telecommunications company registered under the laws of England and Wales, and AT&T intend to establish a joint venture, (the "Parent Corporation" as defined in Section 8.1.14, below), to provide international telecommunications services;

WHEREAS, AT&T and BT will each own 50% of the outstanding shares of the Parent Corporation;

WHEREAS, certain license applications related to the formation of the joint venture have been filed with the FCC in Docket No. 98-212 on 11/10/1998 and will require approval by the FCC, and such approval may be made subject to conditions relating to national security, law enforcement, and public safety;

WHEREAS, on January 8, 1999, the Federal Bureau of Investigation ("FBI") filed comments with the FCC expressing national security, law enforcement and public safety

concerns about the approval of such license applications;

WHEREAS, on January 19, 1999, the Department of Defense ("DoD") filed comments with the FCC expressing national security concerns about the approval of such license applications;

WHEREAS, the Parent Corporation will establish direct or indirect United States subsidiaries (collectively, the "Company," as defined in Section 8.1.3 of this Agreement), including VLT Co. LLC and Violet License Co. LLC, which will be located in the United States and which will own and operate the Domestic Telecommunications Infrastructure (as defined in Section 8.1.7 of this Agreement) directly or indirectly owned by the Parent Corporation;

WHEREAS, the Parent Corporation will directly or indirectly own all of the outstanding shares of the Company;

WHEREAS, the Parties agree that the Company will be required to obtain facility security clearances issued under the National Industrial Security Program ("NISP") (Executive Order 12829, January 6, 1993) in order to conduct any of its business that requires access to Classified Information;

WHEREAS, the NISP requires that in order to maintain a facility security clearance a corporation must be effectively insulated from foreign ownership, control or influence ("FOCI");

WHEREAS, the DoD intends to grant, in accordance with the National Industrial Security Program Operating Manual ("NISPOM"), a facility security clearance to the Company in consideration of the Parties' execution and compliance with the provisions of this Agreement; and

WHEREAS, because it is difficult to predict exactly how AT&T and BT may wish to conduct their business in the future, the Parties intend to work closely together and to share information to permit the Government to monitor the implementation of this Agreement over time;

NOW THEREFORE, the Parties are entering into this Agreement to address all objections that the DoD, the DoJ and the FBI might otherwise have to the grant of FCC licenses to the Company and transfer of ultimate control of FCC licenses to the Parent Corporation.

ARTICLE I - ORGANIZATION

1.1 Members and Principal Managers of the Company

Except as specifically provided herein, the Member or Members of the Company shall have all of the rights, powers, and responsibilities conferred or imposed upon Members of the Company by the applicable statutes and regulations, and by the Company's charter documents. The Company's Principal Managers shall be resident citizens of the United States who have personnel security clearances at the level of the Company's facility security clearance. The Defense Security Service ("DSS") or the designated security component for the FBI (hereinafter, "FBISC") may authorize temporary appointment of a Principal Manager for whom a personnel security clearance is under consideration. Further, all officers (including but not limited to Principal Managers) and employees of the Company having access to Classified or Sensitive Information shall be resident citizens of the United States cleared to the level of the Classified or Sensitive Information to which they have access.

1.2 Within 90 days after the Effective Date (as defined in Section 7.1) of this Agreement, the Company shall promulgate written policies and procedures establishing a formal organizational structure, further described in Article III hereof, to ensure the protection of Classified, Controlled Unclassified, and Sensitive Information entrusted to it and to place the responsibility therefor with a committee of its Principal Managers to be known as the Government Security Committee ("GSC"), as hereinafter provided. The GSC shall be established no later than 30 days after the last of its members has received the appropriate security clearance. Until that time, oversight of the Company's protection of Classified, Controlled Unclassified, and Sensitive Information shall be the responsibility of the Company's designated representative identified in Section 7.3 of this Agreement.

1.3 Departure and Replacement of Principal Managers

1.3.1 The Company shall provide written notification to the DSS and the FBISC in advance, to the extent feasible, of the departure of a Principal Manager of the Company, and of any replacement for the departed Principal Manager. Any replacement for any departed Principal Manager shall meet the qualifications set forth in this Agreement.

1.3.2 The obligation of a Principal Manager to enforce this Agreement shall terminate when the Principal Manager leaves his/her position. Nothing herein shall relieve the departing Principal Manager of the responsibility not to disclose Classified, Controlled Unclassified, and Sensitive Information obtained while a Principal Manager of the Company. Such responsibility shall not terminate by virtue of leaving a position of Principal Manager. The Company shall advise the departing Principal Manager of such responsibility, but failure of the Company to so advise shall not relieve the Principal Manager of such responsibility.

ARTICLE II - FACILITIES AND RECORDS

2.1 Except to the extent and under conditions concurred in by the DoD, the DoJ and the FBI in writing: (1) all Domestic Telecommunications Infrastructure owned directly or indirectly by the Parent Corporation will be owned and controlled by the Company and shall at all times be located in the United States, and (2) all telecommunications of U.S. Joint Venture Subscribers carried over the Company's facilities shall pass through a facility, from which Electronic Surveillance can be conducted, that is physically located in the U.S. and under the control of either the Company or a licensed U.S. carrier.

2.2 The Company's Domestic Telecommunications Infrastructure shall, to the extent required under U.S. law, be capable of complying and configured to comply, and the Company's officials in the United States will have unconstrained authority to comply, in an effective, efficient, and unimpeded fashion, with:

(1) the orders of the President in the exercise of his/her authority under § 706 of the Communications Act of 1934, as amended, (47 U.S.C. § 606), and under § 302(e) of the Aviation Act of 1958 (49 U.S.C. § 40107(b)) and Executive Order 11161 (as amended by Executive Order 11382),

(2) National Security and Emergency Preparedness rules, regulations and orders issued by the FCC pursuant to the Communications Act of 1934, as amended (47 U.S.C. § 151 *et seq*.), and

(3) lawful requests by U.S. federal, state or local law enforcement agencies or U.S. intelligence agencies, certifications, and court orders regarding Electronic Surveillance and the acquisition of Subscriber Information.

2.3 The Company shall maintain within the United States its principal business office and security office. If the Parent Corporation or the Company stores Subscriber Information concerning U.S. Joint Venture Subscribers for any reason:

a. the Company shall maintain a current copy of such information in an office in the United States, and

b. other copies of such information may be stored, and databases concerning same may be maintained, outside of the United States.

2.4 The Company shall store exclusively in the United States if stored by the Company for any reason:

a. all Classified and Sensitive Information; and

b. the copy of any Wire Communication or Electronic Communication Intercepted by U.S.

federal, state or local government agents within the United States to which the Company may have access.

2.5 Content of Wire and Electronic Communications

2.5.1 The Company shall maintain within its Domestic Telecommunications Infrastructure the technical ability to access, and shall make available technical access to or provide the stored Electronic Communications and Wire Communications of U.S. Joint Venture Subscribers pursuant to Lawful U.S. Process.

2.5.2 In the event that the Parent Corporation, the Company or any of their subsidiaries proposes to store Electronic Communications or Wire Communications of U.S. Joint Venture Subscribers at locations outside of the United States, the Company will give prior notice of not less than 90 days to the DoJ. Within 30 days after receipt of such notice, the DoJ may request that the Company consider the DoJ's views or concerns regarding the potential impact on the DoJ's authorities. Upon receipt of such request, the Company will consider both the availability and suitability, from a cost, technical and business perspective, of any reasonable alternatives, including retaining storage in the U.S. Notwithstanding this process or any other provision of this Agreement, at the end of the 90-day period the Parent or subsidiary may proceed with any action not prohibited by law. The foregoing prior notice and consultative process shall not apply to: (1) situations where Electronic Communications or Wire Communications of U.S. Joint Venture Subscribers are already stored outside of the United States; or (2) situations where an individual customer's requirements result in the storage of that customer's Electronic Communications or Wire Communications outside of the United States.

2.5.3 AT&T, BT and the Company shall participate in an industry forum that is sponsored by the DoJ, and that includes representatives from telecommunications carriers, equipment suppliers and Internet service providers, to examine law enforcement policy in the context of global communications. AT&T, BT and the Company also will encourage the participation of other domestic and international industry members in such discussions.

2.5.4 Nothing in this Agreement shall require the Company to store any information or data for a longer period than such information and data are stored in the ordinary course of the Company's business. Nothing in this Agreement shall exempt the Company from compliance with U.S. legal requirements for the retention or preservation of such information or data.

2.6 Except as provided below, the Company shall not provide access to the Wire Communications, Electronic Communications, or Subscriber Information of U.S. Joint Venture Subscribers maintained by the Company to any person if the purpose of such access is to respond to legal process or a request of a foreign government or a component or subdivision thereof.

2.7 The Company shall not, directly or indirectly, disclose or permit disclosure of, or provide access to any of the following:

(a) Classified or Sensitive Information,

(b) the copy of any Wire Communication or Electronic Communication Intercepted by U.S. federal, state or local government agents within the United States, or

(c) Subscriber Information of U.S. Joint Venture Subscribers maintained by the Company under Section 2.3

to any foreign government or a component or subdivision thereof without the express written consent of the U.S. Department of Justice or the authorization of a court of competent jurisdiction in the United States. Notwithstanding anything contained in the preceding sentence, the Company shall not disclose Classified Information to any person not having the requisite U.S. Government security clearance. Any requests or any legal process submitted by a foreign government or a component or subdivision thereof to the Company or an Affiliate for the information identified in (a) through (c) above that is maintained by the Company shall be referred to the U.S. Department of Justice as soon as possible and in no event later than five (5) business days after such request. At least every 3 months, the Company shall notify the U.S. Department of Justice in writing of requests by foreign non-governmental entities for access to or disclosure of either the content of a Wire Communication or Electronic Communication, whether or not stored, or Subscriber Information maintained by the Company.

2.8 The Company shall establish and comply with policies and practices to ensure the safeguarding of Classified, Controlled Unclassified and Sensitive Information, as provided in Article III of this Agreement, and designed to prevent any network, electronic, or other access from outside the United States or from facilities not specifically designated within the United States, to Classified and Sensitive Information, and Controlled Unclassified Information requiring a U.S. export license, entrusted to the Company. In addition, as provided in Article III, or in policies and practices to be established as a result of this Agreement, such safeguarding shall include, but is not limited to, technical security protection, personnel security clearances, and the execution of nondisclosure agreements.

2.9 Except to the extent and under conditions concurred in by the DoD, the DOJ and the FBI in writing, the Company shall have no technological capability, including any technological interface or connection, direct or indirect, that would enable the Company to control any part of the Domestic Telecommunications Infrastructure of AT&T or any other telecommunications company. In addition, the Company shall have no technological capability that would enable it to learn (1) of Lawful U.S. Process regarding AT&T's, or any other

telecommunications company's, domestic or international networks or (2) about Classified or Sensitive Information maintained by AT&T or any other telecommunications company.

2.10 Sensitive Network Monitoring Personnel

2.10.1 The Company shall verify the recent employment and residence history of persons who assume positions in the category of Sensitive Network Monitoring Personnel working in any part of its Domestic Telecommunications Infrastructure. The Company shall provide this information, as well as personal identifying information for such persons (including name(s), alias(es), date and place of birth, social security number, visa and passport numbers) to the FBI. The purpose of this provision is to ensure the trustworthiness of Sensitive Network Monitoring Personnel.

2.10.2 Following the receipt of this information, if the FBI reasonably believes that a person is not sufficiently trustworthy to occupy a position in the category of Sensitive Network Monitoring Personnel and so notifies the Company, the person shall not be permitted to hold a position in such a category; provided, however, that after fourteen (14) days shall have passed after the provision of required information to the FBI by the Company, and no adverse notice shall have been received from the FBI, that person shall be deemed suitable to begin work as Sensitive Network Monitoring Personnel.

2.10.3 If the DoD or the FBI provides information to the Company regarding any person occupying a position in the category of Sensitive Network Monitoring Personnel that reasonably would have precluded that person's occupying a position in the category of Sensitive Network Monitoring Personnel at the outset, then the FBI and the Company shall promptly review this information and promptly make a determination concerning that person's trustworthiness and the appropriateness of such person's continuing to occupy such position in the category of Sensitive Network Monitoring Personnel. If adverse information material to the trustworthiness of a person within the category of Sensitive Network Monitoring Personnel comes to the attention of the Company, then the Company shall either remove the person from such position or promptly provide information about the matter to the FBI. The Company may provide such information to the FBI in a manner that maintains the anonymity of such person, to the extent feasible and proper.

ARTICLE Ill - OPERATION OF THIS AGREEMENT

3.1 Policies and Practices

3.1.1 This Agreement establishes the basis for a facility clearance, which shall be issued to the Company upon satisfaction of the NISPOM review and approval process. The

Company shall maintain practices and written policies designed to prevent unauthorized disclosure of or access to the Classified, Controlled Unclassified, and Sensitive Information entrusted to it.

3.1.2 The Company's policies and practices shall provide that the Company shall exclude any person who does not have the requisite U.S. government clearance, whether or not such person is an officer, employee, agent or other representative of an Affiliate, from access to Classified and Sensitive Information. Within 90 days from the Effective Date of this Agreement, the Company shall establish these policies and practices which shall be subject to the review and approval of the DSS and the FBISC. Such policies and practices shall not be repealed or amended without prior written notice to, and agreement of, the DSS and the FBISC.

3.1.3 AT&T agrees not to reveal or transfer Classified or Sensitive Information to the Company or to any other person except with prior written authorization by the DoD or the FBI. Where such authorization is granted, the information will be protected in the same manner as it was by AT&T.

3.2 Government Security Committee Compliance Programs

3.2.1 There shall be established within the Company a permanent Government Security Committee ("GSC") consisting of no fewer than three Principal Managers and at least one other cleared manager (other than a Principal Manager of the Company). The members of the GSC shall ensure that the Company complies with the policies and practices established pursuant to section 3.1, and shall establish policies and procedures for oversight and monitoring of the Company's compliance with this Agreement.

3.2.2 The Chairman of the GSC shall be a Principal Manager of the Company. The chairman shall designate a GSC member to serve as secretary of the GSC. The secretary shall be responsible for ensuring that all records, journals and minutes of GSC meetings and other documents sent to or received by the GSC are prepared and retained for inspection by the DSS and the FBISC.

3.2.3 A Facility Security Officer ("FSO") shall be appointed by the Company and shall be the principal advisor to the GSC concerning the safeguarding of Classified and Sensitive Information. The FSO shall be responsible for the oversight of the Company's compliance with the requirements of the NISP and this Agreement.

3.2.4 The Company shall develop and implement a Technology Control Plan ("TCP"), which shall be subject to review by the DSS and shall prescribe measures to prevent the unauthorized disclosure or export of Controlled Unclassified Information consistent with applicable United States laws and this Agreement.

3.2.5 A Technology Control Officer ("TCO"), who may be the same person as the FSO, shall be appointed by the Company and shall be the principal advisor to the GSC concerning the protection of Controlled Unclassified Information. The TCO shall be responsible for the establishment and administration of all intra-company procedures, including employee training and oversight programs, to prevent the unauthorized disclosure or export of Controlled Unclassified Information and to ensure that the Company complies with the requirements of United States export control laws and this Agreement.

3.2.6 Upon taking office, the GSC members, the FSO and the TCO shall be briefed by a DSS and a FBISC representative on: (1) their responsibilities under the NISP; (2) the laws related to Electronic Surveillance and the acquisition of Subscriber Information; (3) United States export control laws; and (4) this Agreement.

3.2.7 A member of the GSC shall advise the DSS and the FBISC telephonically as soon as possible after any member of the GSC is aware of or otherwise believes there has been a violation of, or an attempt to violate: (1) any provision of this Agreement; (2) contract provisions regarding security; (3) United States export control laws; (4) the laws relating to Electronic Surveillance and the acquisition of Subscriber Information; or (5) the NISP. Such GSC member shall provide a written report of any such violation to the FBISC, and if appropriate, also to the DSS within 5 business days of the date upon which the GSC becomes aware of the violation.

3.2.8 Upon accepting his or her appointment and thereafter at each annual meeting of the Company with the DSS and the FBISC as provided in subsection 3.3.1, each member of the GSC shall execute and deliver to the DSS and the FBISC an acknowledgment of the obligations imposed by this Agreement and his or her obligations to enforce this Agreement, and a certification regarding the Member's best efforts to ensure compliance by the Company with this Agreement.

3.3 Annual Review and Certification

3.3.1 Representatives of the DSS, the FBISC, the GSC, the FSO and the TCO shall meet annually to review this Agreement and to establish a common understanding of the obligations of this Agreement and the manner in which the Agreement is being implemented.

3.3.2 One year from the effective date of this Agreement and annually thereafter, the Chairman of the GSC shall submit to the DSS and the FBISC an implementation and compliance report. The report shall include the following information:

a. a detailed description of the manner in which the Company is carrying out its obligations

under this Agreement;

b. a detailed description of changes to the Company's security procedures, implemented or proposed, relating to the Affiliates and the reasons for those changes;

c. a summary of any acts of noncompliance with the terms of this Agreement, whether inadvertent or intentional, which have occurred in the previous year, whether previously reported or not, with a discussion of any steps taken by the Company to prevent such acts;

d. a detailed chronological summary of all disclosures or transfers, if any, of Classified and Sensitive Information, and Controlled Unclassified Information requiring a U.S. export license, from the Company to the Affiliates, with an explanation of the United States governmental authorization relied upon for such disclosures or transfers. Copies of any approved export licenses covering the reporting period shall be appended to the report; and

e. a discussion of any other issues that could have a bearing on the effectiveness or implementation of this Agreement.

3.4 Access to Facilities and Information

3.4.1 Upon reasonable notice, the DoD, the DoJ or the FBI may visit any facility of the Company or its subsidiaries in the United States and may inspect any part of such facility for the purpose of verifying compliance with the terms of this Agreement.

3.4.2 Upon reasonable request from the DoD, the DoJ or the FBI, the Company, on behalf of itself and the other Parties shall be authorized to and shall,

a. provide access to information, and

b. make available for interview any officer or employee located in the United States who may be able to provide information

to assist the DoD, the DoJ and the FBI in assessing and verifying the other Parties' compliance with their obligations under this Agreement and in determining whether additional measures are needed.

3.5 Forms, Reports, Certifications

The GSC shall prepare and submit any form, report, or certification required by the DSS or the FBISC.

3.6 Cooperation in Investigations

The Company shall, under this Agreement, cooperate with the DoD, the DoJ and the FBI in investigating, inter alia: (i) breaches of this Agreement; (ii) Electronic Surveillance conducted in violation of Federal or state law or regulation; (iii) access to or disclosure of Subscriber Information in violation of Federal or state law or regulation or this Agreement; or (iv) improper access to or disclosure of Classified Information or Sensitive Information by the Company or any Affiliate.

ARTICLE IV
DISPUTES AND NON-IMPACT ON OTHER GOVERNMENT ACTIONS

4.1 Dispute Resolution

The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement. Disagreements will be addressed, in the first instance, at the staff level by the Parties' designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to higher authorized officials, unless the DoD, the DoJ or the FBI believes that important national interests can be protected, or the Company believes that paramount commercial interests can be resolved, only by resorting to the measures set forth in section 4.3.1 below. If, after meeting with higher authorized officials, either party determines that further negotiation would be fruitless, then either party may resort to the remedies set forth in Section 4.3.1 below. If resolution of a disagreement requires access to Classified Information, the designees of all Parties shall possess the appropriate security clearances.

4.2 Denial of Access to Information

Nothing contained in this Agreement shall limit or affect the authority of the head of a United States Government agency to deny, limit or revoke the Company's access to Classified, Controlled Unclassified, and Sensitive Information under its jurisdiction.

4.3 Enforcement of Agreement

4.3.1. Remedies for Breach. Subject to section 4.1 of this Agreement, if any Party believes that any other Party has breached or is about to breach this Agreement, that Party may bring an action against the other Party for appropriate judicial relief. Alternatively, (1) the DoJ, the FBI or the DoD may bring an action for relief (including equitable relief) before the FCC, and (2) the Affiliates and the Company may petition the FCC for a declaratory ruling with

respect to the Affiliates' or the Company's obligations under this Agreement. Nothing in this Agreement shall waive any defenses to or immunities from suit that a Party may otherwise have. Nothing in this Agreement shall limit or affect the right of the head of a U.S. Government agency to seek revocation by the FCC of any license, permit or other authorization granted or given by the FCC to the Parent Corporation or the Company, or any other sanction by the FCC against the Parent Corporation or the Company, or the right to seek civil sanctions from a U.S. Federal District Court Judge or Magistrate, for any violation by the Parent Corporation or the Company of any U. S. law or regulation or term of this Agreement.

4.3.2 No Waiver of Other Remedies. Subject to section 4.3.3 of this Agreement, the availability of any civil remedy under this Agreement shall not preclude the exercise of any other civil remedy under this Agreement or under any provision of law, nor shall any action taken by a Party in the exercise of any remedy be considered a waiver by that Party of any other rights or remedies. The failure of the DoD, the DoJ, or the FBI to insist on strict performance of any of the provisions of this Agreement, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver, rather, the provision or right shall continue in full force. No waiver by the DoD, the DoJ or the FBI of any provision or right shall be valid unless it is in writing and signed by the DoD, the DoJ or the FBI.

4.3.3 Forum Selection. It is agreed by and between the Parties that a civil action for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement that is not resolved under section 4.1 of this Agreement shall be brought, if at all, in and before a Federal court of competent jurisdiction in the United States, to the exclusion of the courts of any state, territory, or other nation.

4.4 Criminal Sanctions.

Nothing in this Agreement limits the right of the United States Government to pursue criminal sanctions against the Company or any Affiliate, or any director, Member, officer, employee, representative, or agent of any of these companies, for violations of the criminal laws of the United States.

ARTICLE V - TERMINATION

5.1 Terminations by the DoD, the DoJ, and the FBI

This Agreement may be terminated only by the DoD, the DoJ, and the FBI. The circumstances in which termination may be considered are:

a. when the DoD, the DoJ, and the FBI determine that:

i). existence of this Agreement is no longer necessary to maintain a facility security clearance for the Company;

ii). continuation of a facility security clearance for the Company is no longer necessary;

iii). there has been a material breach of this Agreement that requires it to be terminated;

b. in the event of a sale of the Company to a company or person not under FOCI;

c. when the DoD, the DoJ, and the FBI otherwise determine that termination is in the national interest; or

d. when the Company petitions the DSS and the FBISC to terminate. A petition shall contain the reason termination is requested. The DoD, the DoJ, and the FBI will determine, in their sole discretion, whether termination is in the interests of the United States.

5.2 Notice of Termination by the DoD, the DoJ, and the FBI

If the DoD, the DoJ, and the FBI elect to terminate this Agreement, the DoD, the DoJ, and the FBI shall provide the Company with thirty (30) calendar days written advance notice stating the reason for termination.

ARTICLE VI - NON-OBJECTION BY DoD, DoJ AND FBI TO THE GRANT OF FCC LICENSES

6.1 Non-Objection

6.1.1 Upon the execution of this Agreement, the DoD, the DoJ and the FBI will notify the FCC that, provided the FCC approves this Agreement and adopts the Condition to FCC Licenses attached hereto as Exhibit A, the DoD, the DoJ and the FBI have no objection to the grant of licenses that are the subject of the application filed with the FCC in Docket Number 98-212 on 11/10/1998.

6.1.2 Provided that the FCC approves this Agreement and adopts the Condition to FCC Licenses, neither the DoD nor the DoJ shall make any objection they otherwise would have made concerning the formation of the Parent Corporation to the Committee on Foreign Investment in the United States or the President.

ARTICLE VII -- GENERAL

7.1 Effective Date.

The Effective Date of this Agreement shall be the date of the closing of the transaction establishing the Parent Corporation or the date upon which the Parent Corporation, the Company or any of their subsidiaries begin operations pursuant to the authorities granted by the FCC in Docket No. 98-212, whichever is sooner.

7.2 Right to Make and Perform Agreement.

AT&T and BT represent that, to the best of their knowledge, they have and will continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform their obligations hereunder and that this Agreement is a legal, valid, and binding obligation of AT&T, BT, the Parent Corporation and the Company enforceable in accordance with its terms.

7.3 Notices.

With the exception of service of Lawful U.S. Process, all requests for information, visits, interviews and all reports, notices, and proposed modifications provided under this Agreement shall be made to the parties' designated representatives. All reports, notices and proposed modifications under this Agreement shall be delivered by (1) registered or certified U.S. mail; (2) overnight courier (receipt requested); or (3) facsimile (confirmed by mail) addressed to the addresses shown below, or to such other addresses as the Parties may designate by agreement. The representatives shall be:

For AT&T:	Steven W. DeGeorge c/o AT&T Corp. 2020 K Street, N.W. Suite 712 Washington, D.C. 20006
For BT:	Alan Whitfield British Telecommunications plc BT Centre (BTC-EC) 81 Newgate Street London EC1A7AJ ENGLAND
For the Parent Corporation:	Walter Desocio

	General Counsel AT&T- BT Global Venture Room 6110 1200 Peachtree Street, N.E. Atlanta, GA 30309
For the Company:	Steven W. DeGeorge c/o AT&T Corp. 2020 K Street, N.W. Suite 712 Washington, D.C. 20006
For DSS:	Defense Security Service 1340 Braddock Place Alexandria, Virginia 22314-1651 with a copy to: General Counsel Department of Defense The Pentagon Washington, D.C. 20301 - 1600
For FBISC:	National Security Division Attn: Unit Chief, NSU, NS-5A Room 1B045 FBI Headquarters 935 Pennsylvania Ave., N.W. Washington, D.C. 20535 with a copy to: FBI General Counsel 935 Pennsylvania Avenue, N.W. Washington, D.C. 20535
For the DoJ:	Assistant Attorney General Criminal Division Main Justice Building 950 Pennsylvania Ave., N.W. Washington, D.C. 20530

7.4. Other Laws.

Nothing in this Agreement is intended to limit or constitute a waiver of (i) any obligation imposed by Federal or state law or regulation on Affiliates and the Company; (ii) any obligation imposed by Federal law or regulation on the DoD, the DoJ, or the FBI; (iii) any enforcement authority available under Federal or state law or regulation; (iv) the sovereign immunity of the United States; or (v) any authority over Affiliates' activities or facilities that the U.S. Government may possess. Nothing in this Agreement is intended to benefit or confer a right upon any person other than a Party to this Agreement or other U.S. federal, state or local government entities entitled to conduct Electronic Surveillance. Nothing in this agreement shall require, expressly or by implication, the violation of any domestic or foreign law.

7.5. Statutory References.

All references to statutory provisions or to Executive Orders shall include any future amendments to such authorities.

7.6. Precedence of Agreement.

In the event that any resolution, regulation or provision of the charter documents of the Company is inconsistent with any provision of this Agreement, this Agreement shall control.

7.7. Amendment and Modification of Agreement.

7.7.1 Amendment. This Agreement may be modified only by a written agreement signed by all of the Parties. Any substantial modification to this Agreement shall be reported to the FCC within thirty (30) days after approval by the Parties.

7.7.2 Modification. Beginning on the date which is eighteen months after execution of this Agreement, the Parties agree to consider in good faith possible modifications to this Agreement as may be required for the consistent application of U.S. national security, law enforcement and public safety laws and policies to the Company vis-a-vis other international communications services in like circumstances.

7.8 Headings.

The headings contained in this Agreement are for reference purposes only, and do not in any way affect the meaning or interpretation of the provisions.

7.9 Location of Agreement.

Until the termination of this Agreement, one original counterpart shall be kept at the principal office of the Company.

7.10 Freedom of Information Act.

7.10.1 Marking of Information. The DoD, DoJ and the FBI shall take reasonable precautions to protect from improper public disclosure all information submitted by the Affiliates and the Company to the DoD, DoJ and the FBI in connection with or in furtherance of this Agreement and clearly marked with the legend "Company Confidential" or similar designation. Such marking shall represent to the DoD, DoJ and the FBI that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential," or otherwise warrant its protection within the meaning of 5 U.S.C. § 552(b)(4). For purposes of 5 U.S.C. § 552(b)(4), the parties agree that such information is voluntarily submitted. In the event of a request under 5 U.S.C. § 552(a)(3) for information so marked, the DoD, DoJ or the FBI, as appropriate, shall notify the Company of such request and consult with it as to any contemplated release (including release in redacted form) of such information. The DoD, DoJ or the FBI, as appropriate, shall notify the Company five (5) business days in advance of any release of such information under 5 U.S.C. § 552(a)(3).

7.10.2 Use of Information for Government Purposes. Nothing in this Agreement shall prevent the DoD, DoJ or the FBI from lawfully disseminating information as appropriate to seek enforcement of this Agreement, or as otherwise necessary in furtherance of the missions, responsibilities, or obligations of the DoD, DoJ or the FBI, provided that the DoD, DoJ or the FBI shall take reasonable precautions to protect from improper public disclosure information marked as described in the preceding section. Where feasible, the DoD, DoJ and the FBI will make information available for inspection rather than providing copies thereof.

7.11 Partial Invalidity.

If any provision of this Agreement is declared invalid or unenforceable by a court of competent jurisdiction, this Agreement shall be construed as if such provision were reformed or deleted, and the remaining provisions of this Agreement shall remain in full force and effect, unless this construction would constitute a substantial deviation from the Parties's intent as reflected in this Agreement.

7.12 Execution in Counterpart.

This Agreement may be executed in several counterparts, each of which shall be an original.

ARTICLE VIII -- DEFINITION OF TERMS

8.1 Definitions: As used in this Agreement:

8.1.1 "Affiliates" means AT&T, BT, (as described in the Recitals), and the Parent Corporation, individually or collectively, all entities (other than the Company) that Control or are Controlled by the Parent Corporation and all successors and assigns of such parties and entities.

8.1.2 "Classified Information" means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.

8.1.3 "Company" means VLT Co. LLC and Violet License Co. LLC, as described in the Recitals, and any other direct or indirect subsidiaries of the Parent Corporation that own or control any part or portion of the Domestic Telecommunications Infrastructure, and any successor(s) or assigns.

8.1.4 "Control" or "Controlled" as used in Section 8.1.1 of this Agreement, mean the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an entity, or by proxy voting, contractual arrangements, or other means, to determine, direct, or decide matters affecting an entity, in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding:

(1) The sale, lease, mortgage, pledge, or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;

(2) The dissolution of the entity;

(3) The closing and/or relocation of the production or research and development facilities of the entity;

(4) The termination or non-fulfillment of contracts of the entity;

(5) The amendment of the articles of incorporation or constituent agreement of the entity with respect to the matters described in paragraphs (1) through (4) above; or

(6) The matters covered by this Agreement.

The terms "control" or "controlled" as used in Sections 2.1, 2.9, 8.1.3 and 8.1.7 means the ability to direct, supervise or otherwise manage, shut down, interfere with or modify the capabilities of, but does not include routine service maintenance, provisioning or service monitoring.

8.1.5 "Controlled Unclassified Information" means unclassified information, the export of which is controlled by the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Chapter I, Subchapter M, or the Export Administration Regulations (EAR), 15 C.F.R., Chapter VII, Subchapter C.

8.1.6 "Domestic Telecommunications" means telecommunications from one U.S. location to another U.S. location.

8.1.7 "Domestic Telecommunications Infrastructure" means the transmission and switching equipment (including software) that is used to provide Domestic Telecommunications or physically located in the United States and any facility that is used to control such equipment.

8.1.8 "Electronic Communication" has the meaning given it in 18 U.S.C. § 25 10(12).

8.1.9 "Electronic Surveillance" means (i) the interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 25 10(1), (2), (4) and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); (ii) access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701 et seq.; (iii) acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (iv) acquisition of location-related information concerning a telecommunications service subscriber; (v) preservation of any of the above information pursuant to 18 U.S.C. § 2703(f); and (vi) including access to, or acquisition or interception of, communications or information as described in (i) through (v) above and comparable State laws.

8.1.10 "FCC" has the meaning given it in the Recitals. It includes any agency or instrumentality of the United States to which, in the future, all or any part of the functions or responsibilities of the FCC may be transferred or assigned.

8.1.11 "Intercept" or "Intercepted" has the meaning defined in 18 U.S.C. § 2510(4).

8.1.12 "Lawful U.S. Process" means Electronic Surveillance orders or authorizations, and other orders, legal process, statutory authorizations, and certifications for

access to Subscriber Information.

8.1.13 "Member" has the meaning given in Section 18-101(11) of Title 6 of the Delaware Code.

8.1.14 "Parent Corporation" means TNV (Netherlands) BV, as described in the Recitals.

8.1.15 "Parties" has the meaning given it in the Preamble.

8.1.16 "Principal Managers" means those persons occupying positions of director, president, senior vice president, secretary, treasurer and those persons occupying similar positions.

8.1.17 "Sensitive Information" means unclassified information regarding (i) the persons or facilities that are the subjects of Lawful U.S. Process, (ii) the identity of the government agency or agencies serving such Lawful U.S. Process, (iii) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance, (iv) the means of carrying out Electronic Surveillance, (v) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful U.S. Process, and (vi) other unclassified information designated in writing by an authorized official of a federal, state or local law enforcement agency or a U.S. intelligence agency as "Sensitive Information."

8.1.18 "Sensitive Network Monitoring Personnel" means personnel responsible for performing network management, operations, maintenance, or security functions who have regular access to facilities, systems, or equipment which enable monitoring of subscribers' wire or electronic communications, including any such communications that are in electronic storage. This term excludes personnel who (i) perform outside plant operations and maintenance functions, (ii) perform network-level monitoring without the responsibility to monitor the content of a subscriber's communications, or (iii) monitor telemarketing calls by Company personnel or customer-originated calls to the Company.

8.1.19 "Subscriber Information" means information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709, or other legal process established by state law. Subscriber Information does not include the content of any communication.

8.1.20 "United States" means the United States of America including all of its States, districts, territories, possessions, commonwealths, and the special maritime jurisdiction of the United States.

8.1.21 "U.S. Joint Venture Subscriber" means a subscriber, including an employee or similar authorized user of the services provided to a subscriber, of the Parent Corporation or any of its subsidiaries to the extent that such subscriber (i) is regularly provided services at a U.S. location by the Parent Corporation or any of its subsidiaries, and (ii) uses such services at a U.S. location. A customer of a subscriber of the Parent Corporation shall not, by reason of that relationship, be considered a U.S. Joint Venture Subscriber. Neither the Company, nor the subsidiaries of the Parent Corporation or the Company, shall be considered a subscriber of the Parent Corporation.

8.1.22 "Wire Communication" has the meaning given it in 18 U.S.C. § 25 10(1).

This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns.

This Agreement is executed on behalf of the Parties:

VLT CO. LLC

Date: October 1, 1999 By: _____
/s/
Rick D. Bailey

VIOLET LICENSE CO. LLC

Date: October 1, 1999 By: _____
/s/
Rick D. Bailey

TNV (NETHERLANDS) BV

Date: October 1, 1999 By: _____

/s/
James E. Graf II

AT&T CORP.

Date: October 1, 1999 By: _____
/s/
Mary Jane McKeever
Vice President

BRITISH TELECOMMUNICATIONS plc

Date: October 1, 1999 By: _____
/s/
James E. Graf II
President, BT North America Inc.

THE UNITED STATES DEPARTMENT OF DEFENSE

Date: October 7, 1999 By: _____
/s/
Arthur Money
Assistant Secretary of Defense for Command, Control, Communications and Intelligence

THE FEDERAL BUREAU OF INVESTIGATION

Date: October 7, 1999 By: _____
/s/
Larry R. Parkinson

THE UNITED STATES DEPARTMENT OF JUSTICE

Date: October 7, 1999 By: _____
/s/
Eric Holder Jr.

EXHIBIT A

CONDITION TO FCC LICENSES

IT IS FURTHER ORDERED, that the authorization and the license related thereto are subject to compliance with the provisions of the Agreement attached hereto between AT&T Corp., British Telecommunications PLC, TNV (NETHERLANDS) BV, VLT CO. LLC, and Violet License Co. LLC on the one hand and the Department of Defense (the "DoD"), Department of Justice (the "DoJ") and the Federal Bureau of Investigation (the "FBI") on the other, dated October 7, 1999, which Agreement is designed to address national security, law enforcement, and public safety concerns of the DoD, DoJ and the FBI regarding the licenses granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, IB Docket No. 98-212.

I wholeheartedly endorse the Commission's ultimate decision to permit the AT&T/BT joint venture to go forward. It has been almost a year since the parties filed their applications, and our regulatory approval was long overdue.[256] Nonetheless, I write separately to express my continuing concern about the nature of the Commission's approach to mergers, and now sadly, joint ventures as well.

I. The Commission's License Transfer Review Process

As detailed elsewhere, I believe the Commission's license transfer review process is broken. With each transaction, the dangerous legacy of our policies becomes more clearly visible:[257]

> often our "conditions" are not even remotely tethered to our statutory authority to review license transfers;
>
> there is no apparent method to the madness by which some transfers receive heightened scrutiny, while others do not;

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[256] See Applications and Public Interest Statement in Support of the Global Venture of AT&T Corp. and British Telecommunications, plc (AT&T/BT Application)(Nov. 10, 1998).

[257] See e.g. Separate Statements of Commissioner Harold Furchtgott-Roth in: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, AT&T Corp., Transferee, CS Docket No. 98-178 (Feb. 18, 1999); Proposed SBC/Ameritech Conditions, (June 30, 1999); Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141 (October 6, 1999); Application of Airtouch Communications Inc. Transferor and Vodafone Group PLC, Transferee for consent to Transfer Control of Licenses and Authorizations, WTB DA 99-1200 (June 21, 1999); Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, FCC 99-167 (July 9, 1999). See also Testimony of Commissioner Harold W. Furchtgott-Roth before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law Oversight Hearing, May 25, 1999.

at times the Bureau reviews transactions, other times the full Commission acts;

the Commission continues to assert jurisdiction over submarine cable license transfers that would be more properly left to the Executive Branch; and

the Commission continues to characterize the arm twisting associated with these transactions as part of some mythical voluntary process.

Today's decision unfortunately adds a few more straws to the strained camel's back.

Once again the Commission has strayed from the issues raised by the actual transfer of these licenses. The Commission simply does not possess statutory authority under the Communications Act to review, writ large, the joint venture of AT&T and BT. Rather, "we are required to determine whether the transfer of station licenses serves the public interest, convenience and necessity and whether the transfer of authorizations for international resale serves the public convenience and necessity."[258] Nothing more is desirable or permissible. Issues unrelated to the transfer itself such as the API calls and programs described in this Order are simply, in my view, beyond the scope of our review.[259]

I also continue to be concerned that much of our review process is duplicative of the work of the Justice Department's Antitrust Division. The experience and expertise of the Justice Department are best suited to addressing any antitrust issues that may arise in these transactions. Moreover, DOJ uniformly enforces the antitrust laws across all sectors of the economy. Ultimately, I fear that our "heightened" antitrust review may actually penalize the communications industry based purely on their unfortunate fate of being subject to our license transfer jurisdiction.

It also seems, at best, odd that the agency must condition a license transfer on compliance with our existing rules – as if they were somehow discretionary for other licensees. For example, in its Order the Commission notes that: "Consistent with our rules, VLT and TLTD must file quarterly reports on provisioning and maintenance procured from BT directly or indirectly, including through Concert."[260] This is a

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[258] *See* AT&T/TCI; As discussed in my separate statement regarding the Japan-U.S. Cable Network consortium, I believe we lack jurisdiction to receive, review or grant applications for submarine cable landing/operating licenses.

[259] Order ¶ ¶ 54-61.

[260] Order ¶ 85; see also Order ¶ 93.

reasonable enough conclusion, and well within our legitimate authority to review transactions to ensure compliance with our rules.[261] Such authority justifiably extends to clarifying whether our rules apply in the given circumstances of a transaction. However, today's Order does not stop there. Instead the Order adds a curious conclusion: "We nonetheless adopt AT&T/BTs' voluntary commitment to do so as a condition of this Order."[262] Our rules are binding on all licensees with equal force. Yet the Commission's transfer review process has now elevated the sanctity of a voluntary commitment above the requirements of our rules – even when each leads to an identical result. This process seems to place a discriminatory and heightened burden on AT&T/BT. This is particularly disconcerting when the "voluntary commitment" is potentially insulated from judicial review.[263]

Once again, I urge my fellow Commissioners to back away from the use of specific review proceedings to achieve general public policy goals. We have extensive authority to regulate telecommunications, there is no basis or need to expand that authority by using the ad hoc license transfer process to achieve our goals through the back door.

II. The Role of Other Governmental Agencies

To the Commission's credit, much of the delay involved in reaching today's decision was directly attributable to negotiations between the private parties (AT&T, BT, TNV, VLT and Violet) and the Department of Defense, the Department of Justice and the Federal Bureau of Investigation. Today's decision incorporates by reference the agreement between the private parties and these government agencies. A number of elements of this process are troubling.

First, under Section 214(b), the Commission is instructed to notify "the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points) and the Governor of each State in which such line is proposed to be. . .

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[261] As I have stated elsewhere, ensuring compliance with our rules is an appropriate part of our license transfer review process. See Separate Statement of Commissioner Harold Furchtgott-Roth, in Re: Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178 (Feb. 18, 1999).

[262] Order ¶ 85.

[263] Also strange is the Commission's decision to invite enforcement of certain requirements. *See* Order ¶ 70 (regarding idled half-circuits). Presumably consistent with a "policy [that] disfavors allowing capacity to remain idle," we would "entertain a petition to require the sale of those idled half-circuits at market rates" from any party regarding any carrier. Approval of a joint venture should not leave the impression that we will engage in discriminatory enforcement.

acquired. . . with the right of those notified to be heard. . . . "[264] Thus the Commission must take into account the views of these parties in assessing any proposed licensing action. This approach is consistent with the GATS, which provides for national security exceptions under Articles XIV bis. Similarly, in our Foreign Participation Order we assured the parties that we would "consider any such legitimate concerns [regarding national security or law enforcement] as we undertake our own independent analyses of whether grant of a particular authorization is in the public interest."[265] Thus our sole obligation is to consider these parties' input in our independent assessment of the transfer.[266]

Yet here we have gone far beyond that. While we do have comments from these parties on file, we delayed today's Order as we awaited the conclusion of private negotiations between the parties and these governmental agencies. Their ultimate agreement has now been incorporated into our Order. I am concerned that other federal agencies not add insult to the injury that our current "review" process imposes on licensees. The Commission's sanctioning of this agreement with other agencies creates another set of "voluntary" conditions that licensees have little choice but to accept, if they wish to transfer their licenses in any reasonable period of time. As I have noted elsewhere, the involuntary nature of these obligations is compounded by the practical inability of the parties to obtain meaningful judicial review of our determinations in a timeframe that preserves the viability of the underlying transaction. These are not voluntary conditions, they are the Commission's (and now other government agencies') price for doing business through license modifications. Such a process vastly exceeds the role of these other agencies as envisioned by Section 214.

Second, I am disturbed by the seeming arbitrariness of this side agreement between the private parties and the Department of Defense, the Department of Justice and the Federal Bureau of Investigation. While I do not question the underlying merits of the side agreement – they may well be necessary and wholly justified – it seems difficult to

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[264] In an apparent violation of Section 214(b), the Commission neither provided notice to the requisite governors nor did it direct the parties to do so.

[265] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, ¶ 62 (Nov. 26, 1997); Ironically, "we emphasize[d] . . . that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised in very rare circumstances. Contrary to the fears of some commenters, the scope of the concerns that the Executive Branch will raise in the context [of transfers] . . . is narrow and well-defined." Id. at ¶ 63. In my view, the Foreign Participation Order's theory of the role of the Executive is far more consistent with our obligations than our practice in this proceeding.

[266] We are not required by statute to grant any particular weight to such input. However, I would obviously take the issues raised by these government parties very seriously.

tie these requirements to the license transfers at issue here. Most significantly, why is this joint venture singled out for these requirements? Would it not be equally desirable to have all similarly situated carriers subject to these mandates? Does not this process elevate the relative happenstance of this joint venture into the sole variable that determines which carriers are subject to these significant law enforcement and security obligations set forth in the agreement? In other words, it seems unfair that a large international carrier -- that built its business through means other than mergers or joint ventures involving FCC licenses -- would never face these requirements. This side agreement ultimately penalizes a business development plan.

The Order seems to recognize this peril:

> We note that the Agreement reflects a unique situation, and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part. Therefore, this agreement does not establish precedent for future cases.[267]

The Order does not identify what is "unique" about this "situation," except that AT&T and BT had the misfortune to have a joint venture pending at this agency in late 1999. But the general observation of the passage is, at best, distressing. The majority opinion essentially concedes that the application of the terms of the "voluntary agreement" to the industry as a whole may have significant adverse consequences that would warrant our review. We cannot have it both ways – we use our authority to impose these onerous obligations, while distancing ourselves from the outcome.

In the end, if the parties want to negotiate a true voluntary agreement, they can do so on their own time without the cloud of our review process hanging over their heads. Indeed, I would applaud such a voluntary industry-wide effort to address national security and law enforcement issues without Commission involvement.[268] The troubling part of this "deal" is not the substance, but the Commission's role in sanctioning it. Despite the Order's caveats, the Commission's actions speak louder than its words. The agency has held up this transaction pending the agreement and incorporated its terms without so much as a change in punctuation.

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[267] Order ¶ 79.

[268] The agreement itself seems to provide a vehicle for such an accord through the Defense Department's facility security clearance approval process under the National Industrial Security Program Operating Manual. Obviously Congress may assign the Commission a specific role in these matters by statute. See 47 U.S.C. §§ 1001-1021.

Third, I note that our statutory notice obligation does not run to all of the governmental parties to this agreement – but only to the Secretary of Defense. Thus, it seems possible, if not likely, that the other governmental parties to whom notice is required (the Governors and the State Department) will soon understand that our merger review process is an opportunity for them to achieve their policy wish lists through "voluntary agreements" similar to the one we sanction here. Which Executive Branch objections or policy concerns would form the basis for a decision to delay our approval? Which governmental entities warrant such deference and which do not? Is there any limit on the germaneness of such side agreements? Could a state governor reach a voluntary agreement with a joint venture party to construct a new cable landing station in her state in exchange for the removal of her objections to the transfer? Would we delay the transaction pending such an agreement? My concern is that there seems to be no legally compelling way to distinguish the wishful Governor from the governmental parties in this case.

Finally, as I have discussed elsewhere, this agency is on dangerous ground when it purports not only to enforce our decision, but also potentially to play a role in the enforcement of other agency's regulatory determinations. Here the side agreement calls for the parties to seek judicial enforcement of the agreement or "(1) the DOJ, the FBI or the DOD may bring an action for relief (including equitable relief) before the FCC, and (2) the Affiliates and the Company may petition the FCC for a declaratory ruling with respect to the Affiliates' or the Company's obligations under this agreement."[269] As I stated in AT&T/TCI, "we have no jurisdiction to enforce rules not promulgated under the Communications Act. . . and we cannot and should not do the enforcement work of others."[270] Ultimately, this agency runs far afield when it conditions a license transfer on compliance with another's agency's agreement, putting ourselves in the position of potential enforcer of non-FCC requirements.[271] Instead of this approach, it would seem far more manageable if we were to note in our decision that the initial objections of these other governmental parties had been withdrawn based on a private side agreement. It seems unnecessary to incorporate that agreement into our approval or to condition the

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[269] See Order Appendix B at § 4.3.1.

[270] Separate Statement of Commissioner Harold Furchtgott-Roth, in Re: Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178 (Feb. 18, 1999).

[271] Dangerous too is the Commission's intrusion into other nation's regulatory bailiwicks. The decision notes that "it is not clear that Oftel's non-discrimination policy is *sufficient* to prevent BT from manipulating the deployment of particular technologies. . . ." The Commission should reject the temptation to evaluate the efficacy of others' regulatory regimes and instead focus on the impact of those policies on the legitimate considerations of this agency in evaluating transfers.

license on compliance with the third party contract.[272] Only when the Commission itself passed on these national security issues would any type of condition be appropriate.

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I understand and truly believe that the Commission and the other government agencies involved act on these transactions based on a sincere desire to serve the public interest. Many of the ends achieved by merger conditions and voluntary agreements are worthwhile. But the ease and largely standardless nature of the current license transfer process simply cannot be an appropriate vehicle. It denies parties their rights to judicial review; hides the ball from the public during the "negotiations" process; applies these "good" rules to only certain companies; subverts the rulemaking process by removing obligations from the code and placing them in a bevy of adjudicatory determinations; delays business transactions; and consumes immense resources from all parties. As my parents used to say: "There are no shortcuts in life." We all undermine the process and ultimately many of our common goals when we attempt to achieve our goals via shortcuts. I urge other agencies and my colleagues to join me in taking the necessarily more difficult and longer path to achieving these goals.

[272] Nonetheless I understand that here the incorporation of the side agreement was made an explicit condition of the withdrawal of the government parties' objections. I would urge the Commission to work with the other governmental parties to remove such provisions from any future side agreements.